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HANDBOOK

OF

ELEMENTARY LAW

By WALTER DENTON SMITH

SECOND EDITION

By ARCHIE HART McGRAY
INSTRUCTOR IN ST. PAUL COLLEGE OF LAW

HORNBOOK SERIES

ST. PAUL, MINN.
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1939

This edition is affectionately
dedicated to the reviser's
father and mother

PREFACE TO THE SECOND EDITION

The purpose of this revision has been to bring the contents of the first edition up-to-date without deviating from the plan of the original edition any more than necessary. This purpose has required the rewriting or re-editing of the material in the first edition but the various topics discussed and the order of their treatment remain the same except for the following changes: Maritime Law and Martial Law are classified and discussed as divisions of law in chapter 10, rather than as systems of law in chapter 1; corporeal and incorporeal hereditaments are discussed in chapter 9 ("Property"), of part 1, rather than in a separate chapter of part 2; and the subject of Agency is made a section in chapter 19 ("Business Devices"), instead of a separate chapter of part 2. The only other principal change has been in the dividing of the material into sections. The number of these divisions has been greatly reduced and topics that were contained in separate sections now constitute subdivisions of larger sections. This has made possible an extension of the material on various topics without increasing the book's bulk. In other respects, the substance and form of the volume are unchanged.

Because of their importance in American law, an appendix has been added which treats of the American Law Institute and the National Conference of Commissioners on Uniform State Laws. This appendix also includes a list of the jurisdictions which have adopted the Uniform State Laws cited and quoted in the text.

The first edition has been popular with laymen as well as with the first-year law students for whom it was intended and the requests of both of these classes of readers have determined the additions made to the material included. However, the reader is warned that this book is intended primarily as an introduction to the study of law and does not pretend to be conclusive or exhaustive. Its object is merely to declare the more important fundamental principles of law and the basic subdivisions there-

of, and it is analytical and historical only to the extent required by this object, for purposes of explanation and classification. It is a book of general principles the exceptions of which may or may not be set forth.

Gratitude is extended to the American Law Institute for its consent to the use of material from its Restatement; to Roscoe Pound and The Harvard Law Review Association for their consent to the use of a quotation from an article by Mr. Pound published in the Harvard Law Review; and gratitude is extended to the authors of the other volumes in the publisher's Hornbook Series for the use made of their materials.

ARCHIE HART MCGRAY.

ST. PAUL, MINNESOTA,
June, 1939.

PREFACE TO THE FIRST EDITION

The following pages are intended as an introduction to the study of the law. Their aim is simply to take the student across the threshold, and give him a general view of the treasures of learning which lie beyond. The Anglo-American legal system may be compared with one of those old Feudal castles still to be seen in parts of Britain. Essentially an ancient structure, yet having been constantly added to and repaired as the years rolled by, it presents an appearance much different from the Feudal original. Here and there a new wing has been built; and, side by side with the modern elements, standing rugged and strong, some parts of the old building are crumbling into dust.

In the first part of the present work the writer has attempted to present an outside view of this legal edifice. In parts 2 and 3 he has tried to classify its contents, and explain briefly their general character.

It is hoped that the book may be found not wholly unsuited for the purpose it is intended to accomplish.

W. D. S.

ANN ARBOR, MICH.,
May 1, 1896.

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ELEMENTARY LAW

PART 1

ELEMENTARY JURISPRUDENCE

CHAPTER 1

THE NATURE OF LAW

1. Law in General.
2. Scientific Law.
3. Rules of Human Action.
4. Divine Law.
5. Moral Law.
6. Customary Law.
7. Jural or Positive Law.
8. International Law.
9. Municipal Law.
10. Natural Law.

LAW IN GENERAL

1. The term "law" is used in two general senses to designate:

(a) An order or uniformity of nature,

(b) A rule of human action.[1]

The orders of nature which, to the extent that they have been discovered and expressed in general formulas, constitute the laws of science, or scientific law, differ inherently from the rules ap-

[1] Etymologically, the word "law" is derived from the word "lie" and signifies "that which lies" or is "fixed."

According to Blackstone, "In its broadest sense, law signifies a rule of action. It embraces all kinds of actions, animate or inanimate, rational or irrational. Thus we say: the laws of motion, of gravitation, of optics, of mechanics, as well as the laws of nature and of nations. It is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey." Browne's Blackstone's Commentaries, p. 7.

plicable to human action only. The former are methods and results of natural phenomena about which man has reached conclusions from his observation and study of nature and the universe, but which would exist though man did not; while the rules of human action exist because of man and would terminate upon the extinction of mankind.

SCIENTIFIC LAW

2. The laws of science consist of the uniformities of natural phenomena as observed and described by men.

Such a law is a statement that, under conditions within human experience, certain events in nature have been found invariably to accompany or follow certain other events, and it operates whether or not the things involved in the events are capable of making a choice, and whether or not the things involved in the events are animate or inanimate. Such a law is immutable and cannot be disobeyed because it is a part of nature itself. The laws of science may be divided into (a) the laws of the physical and natural sciences, and (b) the laws of the mental and social sciences. The laws of the physical and natural sciences are the uniformities of nature ascertained and studied in such sciences as Astronomy, Geology, Physics, Chemistry, and Biology. Examples of such laws traditionally listed are: the law of gravitation, the laws of the tides, and the laws of chemical combination. The laws of the mental and social sciences consist of the uniform features observed in the behavior of humans, and are studied in such sciences as Psychology, Ethics, History, Sociology, Economics, and Political Science.

RULES OF HUMAN ACTION

3. The rules of human action consist of precepts for the control of the behavior of men and which are enforced by some form of sanction. These precepts include:

(a) Divine law,

(b) Moral law,

(c) Customary law, and

(d) Jural or Positive law.

A sanction is a device employed to induce obedience to a rule, and may be a reward or a penalty.

The common characteristic of these precepts is that they are based upon the postulate that man is a being possessed of reason and will which make him capable of choosing between action which conforms to them and action which does not conform to them. The rules of human action differ from the orders of nature in that the former can be disobeyed and are not immutable. As they can be disobeyed they require sanctions in order that obedience to them may be realized. As they are based upon and derived from the beliefs, habits, and needs of men, they are subject to change with the beliefs, habits, and needs of men.

The precepts for the control of human behavior, often closely related, are not always differentiated, and each classification or system may be found to contain doctrines which, in the abstract, are more properly associated with another system. For example, the Ten Commandments contain at once religious, moral, and legal rules. This confusion in and among the various systems makes accurate, concrete definitions of them improbable, if not impossible. However, the precepts which regulate human action are given separate classification because they differ, generally, in their forms and functions, in the types of human conduct to which they are directed, and in the sanctions intended to compel compliance to them.

DIVINE LAW

4. Divine law consists of precepts for the control of human action which men believe to have been ordained by God and sanctioned by rewards and punishments in the present life or in a life to come.

This is the law of religion and faith. According to most religious beliefs, God has revealed to men certain precepts for their government. These precepts are to be found in the sacred books of the various religions. Examples of such precepts are those contained in the Bible and which are generally received throughout Christendom as the divine law.

MORAL LAW

5. Moral law consists of precepts for the control of human action which arise from the general opinion of a social community as to what is right and wrong and which are sanctioned by public and class opinion and other social forces.[2]

Moral principles and ideas, being founded upon the experience of mankind in social life, develop with such experience and man's reflection upon it. Custom, religion, and individual perception of moral responsibility affect and influence the progress of moral law. As it consists and is a product of public opinion, it fluctuates with public opinion, and the morals of one community may differ in many points from those of another community of a different race, economic structure, and religion.[3]

Moral law is distinguishable from jural law in that the former is enforced by only an indefinite and uncertain authority and there are no tribunals in which it may be administered. There is no established method of procedure for the trial of its alleged offenders, and no definite plan of punishments attached to violations of its precepts. Its penal sanctions consist of social forces such as censure, ridicule, contempt and social ostracism, and its compensatory sanctions consist of social forces such as commendation, preferment, esteem and other honors.

CUSTOMARY LAW

6. Customary law consists of precepts for the control of human action developed by popular usage and ultimately enforced by courts as law.

Custom, which is comprised of ways of acting generally approved and followed in a society, is to be distinguished from what the term "customary law" is here used to connote.[4] In primitive society that part of custom which was considered essential to general welfare and therefore obligatory constituted a rudimentary form of law sanctioned by group opinion, vengeance by the group or the wronged individual, and various psychological factors arising from religion, mutual needs, and social ambitions. And, during the development of society and law, courts adopted the practice of employing customs as guides and standards to facilitate the determination of disputes between persons of a class which generally observed the customs so employed, distinguishing between particular, local, and general customs, a particular custom being one followed by the inhabitants of some particular district; a local custom, one followed by the inhabitants of some town, city, or county; and a general custom being one which prevailed throughout a country, or which was followed by all persons in the same business and territory. The greater the compass of a custom, the greater was its weight in the courts. Once a custom was used by a court in the decision of a case, it became a precedent to be followed by courts in subsequent, similar cases, and so a rule of "customary law," or a part of the law enforced by courts which originated in custom. However, with the evolution of society from the primitive to the modern state and the development of legislatures, the importance of custom as a source of law has increasingly diminished.

2 The modern tendency is to designate this subject "positive morality," or "morals," rather than moral law. See Bowman, Elementary Law, Part I, (hereinafter cited "Bowman"), § 6, p. 13.

3 The contrasting attitudes of various communities with regard to slavery, polygamy, and infanticide are examples commonly cited as illustrating the variability of moral law.

4 The terms "custom" and "customary law" are ambiguous because custom, as such, is treated of by some writers as law. In the sense that divine and moral precepts, by reason of their recognition and observance by men, are law, as distinguished from the jural or positive law enforced by courts, so custom may be regarded as law. However, that is not the sense in which the term "customary law" is used in this book. For a discussion of the various conceptions of these terms, see Customary Law in Modern England, by W. Jethro Brown, 5 Col.L.Rev. 561, 1905.

JURAL OR POSITIVE LAW

7. Jural or positive law consists of precepts[5] for the control of human action recognized or enacted, and applied and sanctioned by the governmental tribunals and agencies of states, and is comprised of two divisions:

(a) International law, which is the law between states,[6] and

(b) Municipal law, which is the internal law of a state.

This is the law with which lawyers work. Its chief characteristics are that it is applied by governmental tribunals and sanctioned by governmental agencies. Jural law is called "positive" because it is sanctioned by political authority. Hence, to the extent that international law is applied and sanctioned by governmental tribunals and agencies it is a part of the jural law. Being admittedly established by men or governments composed of men, with sanctions imposed in the present life, jural law is distinguishable from divine law. Because it is established by determinate authority and enforced by determinate sanctions, jural law is distinguishable from moral law. Customary law is that part of jural law which originated in custom.

INTERNATIONAL LAW

8. International law consists of precepts which national states have adopted as regulatory of their relations with each other and their citizens and subjects in matters growing out of such relations.[7]

5 Legal precepts are of three technical kinds: rules, which are directions for conduct and guides for attaining determinate results or judgments; standards, which are definitive examples of conduct to which conduct in particular cases is compared to determine its legal consequences; and, principles, which are the grounds or reasons upon which rules and standards are based. See Bowman, § 29, pp. 66, 67.

6 The term "state," in the international sense, is used to denote an independent nation and not one of the United States of America. Where it might confuse, and is intended to designate one of the United States, the word will be capitalized "State."

7 The term "private international law" as distinguished from "international law" or "public international law" is sometimes used to designate the rules applied to determine the rights of persons where the conflicting jurisdictions of different states are involved. Such rules fall within the subject Conflict of Laws. See Hilton v. Guyot, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95, 1895; and, Wilson on International Law, 2d. Ed., (hereinafter cited "Wilson"), §§ 1, 2, pp. 1–4.

The term "law of nations" is a synonym of international law.

International law is classified as a rule of human action because it is directed to the behavior of men as individuals and as nationalities.

International law differs from municipal law in that the international community does not have any common legislature, judiciary, or executive to enact, apply, and enforce its precepts.[8] The problems with which international law is concerned are the status of states; the acquisition of territory by states; jurisdiction of states over marginal seas; navigation on the high seas; nationality and expatriation of persons; dealings between states by means of diplomatic and consular agents; the making and operation of treaties; the settlement of international differences by means short of war; rules of war; the rights and duties of belligerents and of neutrals during war; military occupation of territory and the government of such territory; contraband and blockade; maritime capture and prize. The formal sources[9] of such law are treaties and other international agreements, and the decisions of international and national tribunals. The material sources[10] of such law include the customs and needs of nations, treaties and other international agreements, the decisions of international and national tribunals, diplomatic papers, and the opinions of text-writers.[11] The sanctions by which inter-

8 The Permanent Court of Arbitration, established by the Hague Convention of July 29, 1899; the League of Nations, established under Part I of the Treaty of Versailles, June 28, 1919; and, the Permanent Court of International Justice, established under Article 14 of the Covenant of the League of Nations and formally opened February 15, 1922, may perhaps be regarded as precursors of an integrated system of international government. However, mutual consent or agreement of states is still the only acknowledged basis of international law. See Wilson §§ 4, 13, 81; and Bowman, p. 46.

9 "Formal source," is a term used to denote the place or places where the precepts of law may be found, and, consequently, the formal sources of law constitute the primary materials of legal research. See Bowman, pp. 57, 58.

10 "Material source," is a term used to denote the contents of a precept, the ideas on which it is based, the materials which it embraces. Thus, a treaty or a decision may be a formal source and also a material source of international law. For example, a treaty is a formal source of law because it is an authoritative statement of the law; but it may and does become a material source of law if and when it is repeated as law in later authoritative treaties and decisions. See Bowman, pp. 57, 58.

11 See Wilson, § 4, pp. 7–12.

national law is enforced are comprised of public opinion, coercion by other states through all means short of war, and war itself.

International Law in the United States

The Constitution of the United States [12] provides: "The President * * * shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, * * * and all other Officers of the United States;" and, it also provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [13] As treaties are thus made a part of the law of the land in the United States, the international law to the extent that it is declared within treaties entered into by the United States is incorporated into the municipal law of the United States, and offenses by persons against it and the rights of persons arising under international law are adjudged in the municipal courts in accordance with the precepts of that law.[14]

In the case of United States v. Arjona,[15] Waite, C. J., said, "Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States (article 1, section 8, clause 18); and the government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can 'regulate commerce with foreign Nations' (article 1, section 8, clause 3); make treaties and appoint ambassadors and other public ministers and consuls (article 2, section 2, clause 2). A state is expressly prohibited from entering into any 'treaty, alliance, or confederation' (article 1, section 10, clause 1). Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose is given to the United States. The national government is in this way responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized 'to define and punish * * * offences against the law of nations' (article 1, section 8, clause 10)."

[12] Article 2, § 2, cl. 2, U.S.C.A. Const.

[13] Article 6, U.S.C.A.Const.

[14] See Wilson, pp. 12, 13; and, Bowman, pp. 47, 48.

[15] 120 U.S. 479, 7 S.Ct. 628, 30 L. Ed. 728, 1887.

MUNICIPAL LAW

9. Municipal law or the law of a state consists of those precepts for the control of human action which are applied by the judicial and quasi-judicial tribunals and enforced by the executive authority of the state.[16]

Except for that portion of it which may be international in character, this is the law that regulates the internal affairs of a nation. It is often defined as "the sum of rules administered by courts of justice." [17] However, municipal law includes not only the rules administered by the courts of a state, but also such valid regulations as may be made by administrative officials and commissions acting under the authority of legislation and which control operations of government and rights of citizens but which may not necessarily be applied by judicial courts. Further, municipal law contains the decisions of administrative tribunals exercising authority judicial in nature. As such tribunals are agencies of the executive or legislative departments of government but exercise authority usually considered as judicial in nature, they are designated "quasi-judicial tribunals" to distinguish them from courts which are agencies of the judicial department.

Municipal Law in the United States

The municipal law of the United States is derived from the municipal law of England, which accounts for the continual ref-

[16] The term "municipal," when used in this sense, refers to an independent state or nation.

[17] "Law may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of rules administered by courts of justice." 1 Pollock and Maitland, Hist. Eng. Law. 2d. Ed., xxv.

erences made to the latter by students of American law. However, the courts and legislatures of the States and of the United States have molded the English law to the degree that alteration and expansion have been deemed essential to meet the particular requirements of the institutions and conditions in the States. The term "Anglo-American law" is used to designate the law of both countries.

Because of the dual form of government in the United States, two systems of municipal law are made necessary. The municipal law of the United States is designated by the term "federal law" whereas the municipal law of the various states is designated "state law." The municipal law in the United States is what constitutes the principal topic of this book, and its nature and various divisions will be treated of in the subsequent chapters.

NATURAL LAW

10. The term "natural law" is used in two senses by philosophers and jurists:

(a) In an ethical sense to denote principles which ought to govern individual conduct and social relations; and

(b) In a metaphysical sense to denote a universal, perfect, and immutable system of law existing in nature, as distinguishable from the various imperfect systems of jural law enforced in human societies.[18]

The Ethical Sense

Ethics is the science or philosophy of morals. Its students seek to ascertain by inferences from the facts and implications of human and external nature the principles of right or good conduct. It is a source of positive morals and positive law and furnishes standards by which the merit of jural precepts may be weighed, but its function differs from that of law. Ethics is concerned with thought, feeling, and motives, and its object is the perfection of individual character and social life; whereas law is primarily concerned with acts, and deals with mental states only as they cause such acts, and its object is the regulation of behavior or external conduct.

[18] See Bowman, § 8, p. 15.

The Metaphysical Sense

In the metaphysical sense, natural law is purely a philosophical concept. First discussed by Socrates and Plato, it was later distinguished by Aristotle. "Right and wrong have been defined by reference to two kinds of law. * * * Special law is that which is established by each people for itself. * * * The universal law is that which is conformable merely to nature." [19] "Natural law" has been a subject of philosophic deliberation and discourse since Socrates, and the term has been used by jurists, but with different meanings at different times. Whether or not a systematic philosophy of natural law has ever prevailed in the United States is debatable, and belief in the existence, or, at least, in the discoverability of a metaphysical natural law, has now been generally discarded by scholars.[20]

[19] Aristotle, Rhetoric, I 13.

[20] Bowman, § 8, p. 15.

CHAPTER 2

LAW, THE STATE, AND GOVERNMENT

THE STATE

11. A state is a political society of human beings organized for purposes of social control and which has coercive authority over its members.

It is only through states that jural law exists, as it is the governments of states that declare and enforce such law. As an organization of society, it is the state which gives jural law its authority. From the realistic view, and as to its internal affairs and relations, a state is an association of human beings controlling themselves, or in the control of an individual or group, through the agency of a political organization. From the legalistic view, a state may be regarded as an ideal person with a will of its own. An abstract person, functioning by means of the tools of political control. A juristic person, speaking by and through legal precepts, legislators, judges and executives. As to its external affairs and relations, a state may be considered as a sovereign political unit, such as the United States, Great Britain, and France, usually characterized by: (a) dominion over a definite territory; (b) independence of external control; and, (c) sovereign power to assume and perform international obligations.[1]

THE MEMBERS OF A STATE

12. The members of a state are the persons who owe it allegiance and who are entitled to its protection.

A member of a state may be either a citizen, occupying the status entitled "citizenship," or he may be a resident alien, occupying the status designated by the title "residence." A citizen is a permanent member of the state, owes it allegiance at all times, and is entitled to its permanent protection whether he is at home or abroad.[2] The status of his membership ("citizenship") is distinguished by its permanent and personal nature and may be determined by the place of his birth (*jus soli*), by the nationality of his parents (*jus sanguinis*),[3] by his election, or by some form of naturalization.[4] A resident alien, on the other hand, is a person residing within a state other than the state of which he is a citizen. He owes the state of his sojourn allegiance and is entitled to its protection during his stay. The status of his membership ("residence") is distinguished by its temporary and local nature. Citizenship usually includes privileges and powers such as the right to vote or hold governmental office, and special duties such as required military service, which are not included in mere residence. But these may vary in different states and from time to time in the same state.

[1] For a discussion of the various degrees of international status accorded different units see Wilson, §§ 6–22, pp. 15–47.

SOVEREIGNTY

13. Sovereignty is the power to define and exercise social control through governmental agencies.[5]

Where sovereignty is regarded as lying varies in different states with different forms of government,[6] but regardless of

[2] In monarchies, the term "subject" is ordinarily used to designate a permanent member thereof, the term "citizen" being regarded as the more appropriate word for a permanent member of a republic. However, as the term "subject" has also been used to designate an alien resident of a monarchy, the word "national" has been introduced in international law to denote a permanent member of a state, his status being called "nationality." See Bowman, pp. 25, 26.

[3] "As some states follow the *jus soli*, and some the *jus sanguinis*, and some, like the United States, follow both, there has grown up the practice of allowing the child born abroad to elect his allegiance, either following *jus soli* or *jus sanguinis*, upon attaining his majority." Wilson, p. 122.

[4] "Naturalization is the act conferring on a foreigner the status of a national [and] may be (1) by individual choice under a general law; (2) by marriage; (3) through act of parents; (4) through general transfer of allegiance to a state acquiring new territory; (5) in consequence of certain special service, etc.; (6) by special act of legislation." Wilson, p. 123.

[5] The term "sovereignty" is used in contradictory senses for discussions of which the commentators on political science must be consulted.

[6] The various forms of government include aristocracies, democracies, monarchies, oligarchies.

CHAPTER 2

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Where sovereignty is regarded as lying varies in different states with different forms of government,[6] but regardless of

[2] In monarchies, the term "subject" is ordinarily used to designate a permanent member thereof, the term "citizen" being regarded as the more appropriate word for a permanent member of a republic. However, as the term "subject" has also been used to designate an alien resident of a monarchy, the word "national" has been introduced in international law to denote a permanent member of a state, his status being called "nationality." See Bowman, pp. 25, 26.

[3] "As some states follow the *jus soli*, and some the *jus sanguinis*, and some, like the United States, follow both, there has grown up the practice of allowing the child born abroad to elect his allegiance, either following *jus soli* or *jus sanguinis*, upon attaining his majority." Wilson, p. 122.

[4] "Naturalization is the act conferring on a foreigner the status of a national [and] may be (1) by individual choice under a general law; (2) by marriage; (3) through act of parents; (4) through general transfer of allegiance to a state acquiring new territory; (5) in consequence of certain special service, etc.; (6) by special act of legislation." Wilson, p. 123.

[5] The term "sovereignty" is used in contradictory senses for discussions of which the commentators on political science must be consulted.

[6] The various forms of government include aristocracies, democracies, monarchies, oligarchies.

where it is deemed to lie, sovereignty resides potentially, if not actually, within the people as a whole by reason of their power to revolt. The power of a government to command is no greater than its ability to obtain obedience to its precepts. Its ultimate guarantee is public opinion, not force. "The final authority from which there can be no appeal does not reside in the state, which the people have created or permitted to be created, and which they can destroy, but in the people themselves." [7] A political society which possesses sovereign power within itself and which is not dependent upon or responsible to any external superior is termed a "sovereign state;" and, generally, only sovereign states are recognized in international affairs. Such a society is said to have a "representative government" when those possessing the sovereign power have delegated its exercise, within designated or understood limits, to public officers.

Secondary Meanings of the Word "Sovereignty"

The word "sovereignty" is commonly used in different senses to denote operations of government. The two most important of these, as distinguished from political sovereignty, may be designated as "legal sovereignty" and "governmental authority." Legal sovereignty, as a matter of the legal organization of the state, is the authority in the state which is recognized as being legally paramount in the formulation of law. In its highest manifestation, (though this does not necessarily or always exist), it is the power which can alter the constitution without revolution; that is, in accordance with its terms and without overthrowing it. Governmental authority, on the other hand, is the lesser power of making, applying, and enforcing law in conformity with the constitution as it exists, and subject to the restraints, legal or merely moral, found therein.[8]

[7] Bowman, p. 40.

[8] Bowman, p. 41.

The legal sovereignty of a nation may be considered as manifested either internally or externally. Thus, the internal sovereignty of a nation is its legal authority over actions within it, whereas its external sovereignty is its legal authority to enter and perform international obligations. As a concept of international law, sovereignty is freedom from foreign control recognized by other nations.

THE CONSTITUTION

14. The constitution of a state consists of precepts in accordance with which governmental powers are to be exercised.

"Two fundamental ideas are commonly implied in the term 'constitution.' The one is the regulation of the form of government; the other is the securing of the liberties of the people. But the former only is essential to the existence of a constitution, * * * If, in any given country, it is settled law that the form of government shall be a monarchy, an oligarchy, or a democracy, as the case may be, and that the succession to the exercise of supreme executive power shall be determined in a regular manner, that is enough to make up the constitution of that country." [9]

A constitution may derive its authority from the people, emanate from a monarch or a legislature, be a mere plan in fact according to which governmental affairs are conducted, or it may be an historical accumulation of traditions, precedents, statutes and conventional understandings regarded as morally binding and usually complied with but which may be departed from by the governmental agencies. It may or may not be the fundamental, organic, and paramount law to which the actions of the various governmental departments must conform in order to be valid.

"Written" and "Unwritten" Constitutions

A constitution may be "written" or it may be "unwritten;" and, "among the various constitutional governments of the world, it is customary to make a distinction between those which possess a 'written' constitution and those which are governed by an 'unwritten' constitution. The distinction, however, is not very exact. It is difficult to conceive of a constitution which should be wholly unwritten. Practically, this term means no more than that a portion of what is considered to belong to the constitution of the country has never been cast in the form of a statute or charter, but rests in precedent or tradition. * * * Between written and unwritten constitutions, as these terms are generally employed, the chief differences are: First. A written constitution sums up in one instrument the whole of what is considered to belong to the constitution of the state; whereas, in

[9] Black on Constitutional Law, 4th. Ed., p. 2.

the case of an unwritten constitution, its various parts are to be sought in diverse connections, and are partly statutory and partly customary. Second. A written constitution is either granted by the ruler or ordained by the people at one and the same time; while an unwritten constitution is gradually developed, and is contributed to not only by the executive and legislative branches of government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law. Third, a written constitution is a creation or product, while an unwritten constitution is a growth. The one may be influenced, in its essentials, by history, but is newly made and set forth. The other is not only defined by history, but, in a measure, is history. Fourth. Alteration or amendment of a written constitution is accomplished only by observance of the most exacting formalities. An unwritten constitution, on the other hand, will expand and develop, of itself, to meet new exigencies or changing conditions of public opinion or political theory. Fifth. A written constitution, at least in a free country, is a supreme and paramount law, which all must obey, and to which all statutes, all institutions, and all governmental activities must bend, and which cannot be abrogated except by the people who created it. An unwritten constitution may be altered or abolished, at any time or in any of its details, by the lawmaking power." [10]

THE GOVERNMENT

15. The government of a state consists of the agencies by or through which its laws are made, applied, and enforced.

As the term "state" is abstract, so the term "government" is concrete, and the government of a state exercises such powers as have been permitted or delegated to it by the state.

The Objects of Government

The objects of government are divided into those historically considered as being "primary," and those which are considered as "secondary." The primary objects of government are: (a) to represent and protect the state in international affairs; and (b) to regulate and adjust disputes arising in its internal affairs. "The two primary and minimum forms of state activity, therefore, are war against foreign and domestic enemies and the administration of justice."[11] All other objects which a modern government may affirmatively undertake for the welfare of its members such as the establishment and operation of postal and educational systems, the coinage of money, the care of highways, and the encouragement of inventions are classified as secondary.

[10] Black on Constitutional Law, 4th. Ed., pp. 5, 6.

[11] Bowman, p. 30.

The Functional Division of Government

The law of a state is made, applied, and enforced by and through its government, and as this process necessarily involves three distinct operations, the governmental process is functionally divisible in accordance therewith, one function being legislative, another judicial, and the third, executive. However, the degree to which these functions are separated and distributed among independent but co-ordinate departments or officials varies in the different states with different forms of government.

The reasons given for separating the legislative, judicial, and executive functions and the granting of them to independent departments in those states where the divisions are relatively distinct are the promotion of efficiency and the avoidance of possible tyranny by reason of the restraint each department may exercise on the others. In such states, the legislative department (usually termed the Legislature, Congress, General Assembly, or Parliament) has the power to enact laws to meet the requirements of new developments. It also has the power to modify, amend, and repeal existing laws. The judicial department has the power to select and apply the pertinent rules to conflicts between the government and private persons, or between private persons, as the facts of such conflicts arise. The executive department (the chiefs of which are variously called the President, Governor, or Prime Minister) has the power to enforce the laws enacted by the legislature and the decisions rendered by the judiciary.

Incompleteness of Functional Division

Generally, and of necessity, the separation of the legislative, judicial, and executive powers of a government is not complete. And, generally, in states where the three functions are delegated to separate departments, each department does not possess or exercise exclusively the power granted to it. For example, the legislature may have authority to expel its members for cause and have authority to enforce its judgments in such cases, thus exercising judicial and executive functions; the judiciary may exercise legislative authority where there is no rule to govern

a pending case; and, the executive may be authorized to promulgate legislative regulations having the force of law, or its tribunals may have authority to exercise judicial power in applying rules to conflicting personal and property interests involved in certain types of disputes. Such overlapping exists even in those states where the three functional divisions of government are, comparatively, the most distinct.

UNITARY AND FEDERAL GOVERNMENTS

16. A government is either unitary or federal when considered with reference to the territory under its authority.

A unitary government is one which has authority over a territory not subject to the rule of other constituent and co-ordinate governments. Parts of the territory such as cities, towns, and counties may be under what are called "local governments," but the latter are subordinate to and subdivisions of the unitary government which is complete. A federal government, on the other hand, is one which has authority over a territory subject to the rule of other constituent and co-ordinate governments, the powers of each being delimited by the constitution, precluding either from lawfully encroaching on the other.[12]

[12] A federal government is distinct from a confederation of states. The latter, denoted by the term "confederacy," is a combination of states which have agreed to act in common concerning certain specified matters.

Strictly speaking, it is the government, not the state, that is federal. All states are unitary. However, a state which has a federal government is commonly spoken of as a "federal state." See Bowman, p. 43.

CHAPTER 3

GOVERNMENT IN THE UNITED STATES

GENERAL NATURE OF THE UNION

17. The United States of America is a nation with a federal government, is composed of commonwealths technically called "States" under unitary governments, and has supreme authority over matters within the powers granted to it by the people through its constitution. Geographically it includes States, Territories, the District of Columbia, and Insular Possessions.

In General

The United States of America constitutes a state in the international sense with sovereignty which may be manifested either internally or externally. "That the United States form for many, and for most important, purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one, and the government which alone is capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory." [1]

The States which are the members of the Union are not nations in the international sense although they are, except for

[1] Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. 264, 413, 5 L. Ed. 257, 1821.

the Union, independent of each other. "They are political communities, occupying separate territories, and possessing powers of self-government in respect to almost all matters of local interest and concern. Each, moreover, has its own constitution and laws and its own government, and enjoys a limited and qualified independence." [2]

The territories such as Alaska and Hawaii, are not States. "They do not possess full powers even of local self-government. They are subject to the exclusive jurisdiction and legislation of Congress, although they are practically intrusted with a considerable measure of authority in respect to the government of their purely local affairs. Their officers are appointed by the President, and the acts of their legislative assemblies are liable to be overruled or annulled by the federal legislature." [3]

The District of Columbia comprises an area ceded to the United States by the States for the seat of the federal government. "It is neither a state nor a territory. Its people have no direct participation in the government, even in respect to the administration of municipal affairs. Its executive department consists of a board of commissioners who are appointed by the President of the United States with the advice and consent of the Senate. Its judges are appointed in like manner. Its local legislature is Congress. Its permanent residents are citizens of the United States, if they fulfill the conditions of citizenship laid down in the fourteenth amendment, but they are not citizens of any state." [4]

The United States as a nation may acquire new territory either by conquest, purchase, or cession. "Upon the acquisition of such territory, it ceases to be a 'foreign country' within the meaning of the tariff laws, and it becomes a part of the United States for all purposes of international law and foreign relations. But it does not follow that it becomes a part of the United States for domestic or governmental purposes. It is 'territory appurtenant to the United States' and subject to its dominion and sovereignty, but does not become an integral part of the Union until incorporated into it by act of Congress. * * * Until Congress shall order a change, the laws regulating personal and property rights, the domestic relations, and the procedure of the courts, remain as they were under the former government of such territory, and criminal proceedings by grand and petit juries are not substituted for the existing forms of criminal procedure. * * * It rests in the wisdom and discretion of Congress to organize such new possessions under the ordinary form of territorial governments, * * * or to retain them under such form of government as it shall see fit to provide; and in the latter case it may delegate its legislative authority over them to the executive department or to such persons as the President may appoint or to such other agencies as it may choose." [5] Excluding the District of Columbia, areas subject to the domain of the United States which do not have State or Territorial status are designated by the term "Insular Possessions," existing examples of which include Puerto Rico, the Virgin Islands, and the Panama Canal Zone.

[2] Black on Constitutional Law, 4th. Ed., pp. (hereinafter cited "Black"), 15, 16.

[3] Black, p. 16. And see, First Nat. Bank v. Yankton County, 101 U.S. 129, 25 L.Ed. 1046, 1879.

[4] Black, pp. 16, 17.

The Constitution provides that the Congress shall have power: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cessation of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." Art. 1, § 8, cl. 17, U.S.C.A.Const.

The Colonial Governments

Before the Revolutionary War (1775–83), the thirteen political organizations which became the original United States of America were colonies of Great Britain. Three forms of government obtained among them: (a) Provincial, (b) Proprietary, and (c) Charter. Under the provincial form of government a governor was appointed by royal commission to act as the king's representative. The governor was invested with general executive power, could veto local legislation, and establish courts and appoint judges. He was assisted by a council appointed by the king, and this council also constituted the upper house of the local legislature.[6] The executive power of the proprietary governments had been granted to individuals by the crown, who held them in the nature of feudatory principalities. The proprietaries appointed the governors, and the legislatures were assembled under their authority.[7] The charter governments were founded on grants from the crown which professed to secure various liberties to the colonies concerned and which invested them with general powers of local self-government subject only to the

[5] Black, p. 17.

[6] The colonies with this form of government were New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia.

[7] This form of government prevailed in the colonies of Maryland, Pennsylvania and Delaware at the time of the revolution.

suzerainty of the mother country and certain particular restrictions.[8]

The Continental Congress and the Declaration of Independence

The Continental Congress, which met in 1774, pursuant to a recommendation that contemplated a deliberation on the state of public affairs made by Massachusetts and adopted by the other colonies, constituted a first step toward union.[9] All the colonies except Georgia were represented, the delegates of some having been chosen by their legislative assemblies; those of the others, by the people directly.[10] The powers of this Congress were undefined but it proceeded, with the acquiescence of the colonies and their people, to pass resolutions concerning the general welfare and independence, and was succeeded in the following year, as it proposed, by another similar body chosen and organized in the same manner in which all the colonies were represented. Finally, on July 4, 1776, it was the Continental Congress that issued the Declaration of Independence.[11]

[8] Massachusetts, Rhode Island, and Connecticut, were the colonies under the charter form of government. In Massachusetts, the governor was appointed by the king, but in Rhode Island and Connecticut the governor, council, and assembly were selected annually by the freemen, and all other officers were appointed by their authority. See, Black, pp. 31, 32.

[9] The Virginia assembly, acting independently, made a similar, contemporaneous proposal.

[10] This assembly, on October 14th, 1774, adopted what has come to be known as the Declaration and Resolves of the First Continental Congress, addressed to His Majesty and to the people of Great Britain, and containing statements of rights and principles, many of which were later incorporated into the Declaration of Independence and the Constitution of the United States.

[11] The enacting clause of the Declaration is: "WE, THEREFORE, the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."

The Articles of Confederation

"When it became apparent that a war had been entered on which must result either in the destruction of American liberties or in the introduction to the world of a new nation, it was evident to all those interested in the conduct of public affairs that the revoluntionary Congress was at once too weak and too indefinite a bond between the states. It was necessary to devise a scheme of association which would insure vigor and faithful co-operation in the conduct of hostilities and would also more clearly apportion the powers of government between the states and Congress. The Congress, to this end, prepared a series of 'Articles of Confederation and Perpetual Union,' and submitted them to the states for their approval and ratification in 1777. Before the close of the following year the articles had been ratified by all the states except Delaware and Maryland. Of these, the former gave in its adherence in 1779, and the latter in 1781." [12] However, the Articles proved to be inadequate. "The United States of America," [13] as thus constituted, was dependent on the states. "There was a central government, but it was not intrusted with the means of its own preservation. It had no executive; it had no courts; it had no power to raise supplies." [14] The powers granted to the central government by the Articles, and which were not self-executing, were at the mercy of the individual states. Therefore it became necessary to "form a more perfect Union" [15] by establishing a constitution which should provide the central authority with adequate powers and sufficient means for securing their enforcement. Such a document was devised by the constitutional convention which met in 1787, pursuant to a resolution of Congress and which was composed of delegates from all the states except Rhode Island; and this document, which provided that "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same," [16] after its transmission to Congress by the constitutional convention and its submission to and ratification by the several states, was ordained and established by the people of the United States as the "Constitution for the United States of America." [17]

[12] Black, pp. 33, 34.

[13] So entitled by Article 1 of the Articles of Confederation.

[14] Black, p. 36.

[15] U.S.C.A. Constitution, Preamble.

[16] U.S.C.A.Const., Art. 7.

[17] U.S.C.A.Const., Preamble.

CONSTITUTIONS IN THE UNION

18. The Constitution of the United States constitutes the organic law of such nation, grants certain powers to the government thereof, denies certain powers to the States, enumerates various inviolable rights of the people, and is equally binding upon the federal government, the States, and all their officers and members.

The Constitution[18] within one year from its drafting by the constitutional convention and submission to the states by the Continental Congress was ratified by Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, and New York; [19] and, on September 13th, 1788, the Continental Congress passed a resolution which provided for the first election of federal officers and the inauguration of the national government set forth by the Constitution. After various delays, the first President took the oath of office prescribed by the Constitution [20] on April 30th, 1789, and the Government of the United States began its functions.[21]

Amendments and the Bill of Rights

The Constitution [22] provides that: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;" and, at its first session, Congress prepared twelve amendatory provisions and submitted them to the states. Criticisms had been made of the original Constitution for its failure to guarantee personal and States' rights against oppressions and

18 The Constitution of the United States is a "written," as distinguished from an "unwritten," constitution. See § 14, supra.

19 "The states of North Carolina and Rhode Island were not in the Union from its beginning. The former ratified the Constitution in 1789, and the latter in 1790." Black, p. 38.

20 Article 2, § 1, cl. 7, U.S.C.A. Const. See note 27, infra.

21 See Black, p. 38.

22 Article 5, U.S.C.A.Const.

encroachments by the federal government. The twelve amendments proposed were in response to these objections and were submitted for the purpose of allaying them. Ten were ratified by eleven of the states before the close of 1791, and constitute the first ten amendatory articles of the Constitution.[23]

The so-called "Bill of Rights" consists of the first nine amendments.[24] These were intended to ensure certain, enumerated rights of persons from federal action.[25] However, the personal rights enumerated are not exclusive as the Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." [26]

The supremacy of the Constitution is declared in Article 6 which, as already shown, provides that, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding." [27]

The State Constitutions

Eleven of the original states had constitutions which antedated the federal constitution, and every state now a member of the Union has a constitution of its own. The people of a new state admitted into the Union have the right to ordain a constitution for their state, provided that it is consistent with the Constitu-

23 At the present time there are twenty-one amendments to the Constitution.

24 See Black, p. 42.

25 For example, the First Amendment, U.S.C.A.Const. reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

26 It is fundamental that the constitutions in the Union do not create private rights. They define and guarantee certain private rights, but they do not create such rights. See Black, pp. 7, 8.

27 Before entering upon the duties of his office, the President must swear or affirm that he will "preserve, protect and defend the Constitution," (Art. 2, § 1, cl. 7, U.S.C.A. Const.); and the senators and representatives of Congress, the members of the several state legislatures, and all executive and judicial officers of the United States and of the several states must be bound by oath or affirmation to support the Constitution, (Art. 6).

tion of the United States. The revising of a state constitution is usually done by a convention which refers its conclusions to the vote of the people. If the state constitution does not provide for the calling of a constitutional convention to revise or amend it, the general authority of the legislature includes the power to initiate such a project by submitting the question to the people, and if a majority approve, the legislature may take measures for the election of delegates to the convention and appoint the time and place of its meeting. When the work of the convention is done its proposals must be submitted to the people unless the convention was authorized to enact, as well as draft, revisions agreed upon. However, a revision enacted by such a convention without authority may become valid by ratification, if it is acknowledged and accepted by the officers of the government and acquiesced in by the people, as the latter may revise or amend the state constitution at their pleasure so long as the revision or amendment is made in the manner set forth by the constitution, if any, or as directed by the legislature, is adopted by a vote of the qualified electors of the state, and is not in any particular repugnant to the Constitution of the United States.[28] The constitutions of the several states differ in various details, but generally they guarantee specified, personal rights; and, generally, they are regarded as restrictions or limitations on governmental power rather than as grants of such power.

GOVERNMENTS IN THE UNION

19. The Government of the United States is republican in form, is a federal government with its functional divisions vested in separate but co-ordinate departments, and has only those powers expressly and impliedly granted to it by the Constitution of the United States.

A republic, as distinguished from a despotism, a monarchy, an aristocracy, or an oligarchy, is a government wherein the political power is confided to and exercised by the people. It is a government "of the people, by the people, and for the people." It implies a practically unrestricted suffrage and the frequent interposition of the people by means of the suffrage in the conduct of public affairs.[29] The Government of the United States is republic in form and its functions are divided and vested in separate

[28] See Black, pp. 45, 46.

[29] Black, p. 24.

legislative, executive, and judicial departments by reason of provisions in the federal constitution.

The Legislative Department

The Constitution[30] provides that, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." And the membership and election of the Senate is regulated by the Seventeenth Amendment, the first clause of which reads, "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." As for the election of the House the Constitution[31] provides, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The population of a state determines the number of representatives it is entitled to have in the House. Concerning the election of the Congress as a whole, the Constitution[32] specifies, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Each House is made the judge of the elections and qualifications of its members, may punish and expel them for disorderly behavior, and each may determine the rules of its proceedings of which a journal must be kept and published from time to time.[33] The House of Representatives has the sole power of impeachment,[34] and the Senate has the sole power to try all impeachments.[35] The persons liable to such impeachment are the President, the Vice-President, and all civil officers of the United States including the judges, but not members of Congress.[36]

[30] Art. 1, § 1, U.S.C.A.Const.

[31] Art. 1, § 2, U.S.C.A.Const.

[32] Art. 1, § 4, U.S.C.A.Const.

[33] U.S.C.A.Const., Art. 1, § 5. However, the Houses need not publish such parts of their proceedings "as may in their Judgement require secrecy."

[34] U.S.C.A. Const., Art. 1, § 2, cl. 5.

[35] U.S.C.A.Const., Art. 1, § 3, cl. 6.

[36] See U.S.C.A.Const., Art. 2, § 4; and Black, pp. 141–143.

The Executive Department

The Constitution[37] directs that, "The executive Power shall be vested in a President of the United States of America." His qualifications, manner of election, and term of office, which is four years, are also prescribed by the Constitution.[38] The Vice-President is elected at the same time as the President and holds his office for the same term. If the President is removed from office, dies, resigns, or is otherwise disabled, the powers and duties of the office devolve upon the Vice-President.[39] Both the President and Vice-President are chosen by electors representing the several states, each state being entitled to the same number of electors as it has senators and representatives in Congress. The state legislatures have exclusive power to direct the manner in which the presidential electors shall be appointed.[40]

Article 2, section 2, of the Constitution, in part provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Among his other powers, the President has constitutional authority to veto or approve any bill passed by the Congress, and every such bill must, before it becomes a law, be presented to

[37] Art. 2, § 1, U.S.C.A.Const.

[38] Art. 2, § 1; Am. 12, U.S.C.A. Const.

[39] U.S.C.A.Const., Art. 2, § 1, cl. 5.

[40] "Such appointment may be made by the legislature directly, or by popular vote in districts, or by a general ticket, as the legislature may direct. At the present day, the method last mentioned is almost universally in use." Black, p. 119.

him.[41] However, the President must exercise his veto power within ten days after the presentation of a bill, and his veto may be overruled by the concurrent vote of two-thirds of both houses of Congress. If he approves a bill by signing his name to it the bill thereupon becomes a law.

The Judicial Department

The Constitution[42] declares that, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior." The functions, powers, and duties of the judiciary will be treated of more fully in subsequent chapters.

The Authority of the United States Government

The United States government is one of delegated powers. Its authority is limited to those powers expressly and impliedly granted to it in the Constitution of the United States. It was established by the people of the original states for the purpose of regulating the affairs of and between the people and the states as a nation and consequently the powers granted to it include only those deemed essential for the control of matters national in character.[43] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[44]

The State Governments

The state governments are unitary, and republican in form.[45] Their functional divisions are vested in separate departments, and they have such powers as are not delegated to the United States, nor prohibited to them by the Constitution of the United States

[41] U.S.C.A.Const., Art. 1, § 7, cl. 2.

[42] Art. 3, § 1, U.S.C.A.Const.

[43] For example, the authority of the federal government includes such powers as the regulation of commerce among the states and with foreign nations; the naturalization of aliens; the coinage of money; the establishment of post offices; and, the raising and supporting of an army and navy. For various other powers granted see, in particular, U.S.C.A.Const., Art. 1, § 8.

[44] U.S.C.A.Const., Am. 10.

[45] "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S.C.A.Const., Art. 4, § 4.

and their own constitutions. Of the provisions of the federal constitution prohibiting powers to the States are the following:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."[46]

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."[47]

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[48]

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[49]

The Legislature

All the states have legislatures, generally consisting of two Houses,[50] the members of which are elected by popular vote. The term of office in one house may differ from that in the other house, and the number of legislators provided for will vary from state to state. The authority of a state legislature extends to every subject of legislation, unless, in the particular instance, its

[46] Art. 1, § 10, cl. 1, U.S.C.A.Const.

[47] Art. 1, § 10, cl. 2, U.S.C.A.Const.

[48] Art. 1, § 10, cl. 3, U.S.C.A.Const.

[49] Am. 14, § 1, U.S.C.A.Const.
Some of the personal rights safeguarded by the Bill of Rights against national action may also be safeguarded against State action because a denial of them would be a denial of "due process of law." See, Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97, 1908; Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, 1932; Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, 1936.

[50] One state, Nebraska, has an unicameral legislature.

exercise is forbidden by the Constitution of the United States, a treaty, an act of Congress, or the constitution of the state.[51]

The Executive

The executive power in each of the states is vested in an office the occupant of which is called the "governor," and in most of the states there is a second executive officer called the "lieutenant governor" who succeeds the governor in his office in case of his death, resignation, removal, or disability. Generally, governors are elected by popular vote, but their terms of office vary in the different states. Ordinarily the office of governor has the duty and power of enforcing the laws; recommending measures to the legislature; appointing certain subordinate executive officers, and removing them for cause; and granting pardons and reprieves for offenses against the state. Usually, the governor has the power to veto bills passed by the legislature, and usually he is the commander in chief of the militia of the state.

An attorney general, a secretary of state, and a state treasurer are other officers of high rank generally included in state executive departments. Such departments also generally include different boards and commissions charged with the duty of administering certain laws.

The Judiciary

The judicial power of each state is vested in a system of courts, the details and differences of which will be discussed more fully in subsequent chapters.

Local Self-Government

Each of the states has divided its territory and created subordinate, subservient political bodies called public corporations to act as agencies of the state in the government of such divisions of its territory. These organizations constitute legal personalities distinct from their members or the persons within their jurisdictions, which means that they can sue and be sued, acquire, hold and dispose of property in their own names, and that they exist independently of the persons who compose them. Such public corporations are classified either as municipal corporations, or as quasi corporations.[52] A municipal corporation is a complete, public corporation established under and by virtue of a legislative

[51] See Black, § 154, p. 334.

[52] See Cooley's Municipal Corporations, (hereinafter cited "Cooley"), p. 12.

act which unites the people and land within a prescribed boundary into a body corporate and politic invested with the powers necessary for local, self-government. Cities, towns, and other districts so organized are classified as municipal corporations. All local subdivisions of a state, other than municipal corporations, are classified as quasi corporations. A quasi corporation is distinguishable from a municipal corporation in that the former is loosely organized and possesses only a part of the powers and attributes characteristic of municipal corporations. Counties, New England towns, townships, school districts, and such legal bodies as drainage districts, levee districts and road districts have been held to be quasi corporations. Such organizations "represent the lower order of corporate life, and vary in their functions according to the purposes which they are intended to serve."[53]

The powers of municipal corporations and of quasi corporations are restricted to those which are expressly and impliedly granted to them by charter, constitutional and statutory provisions, and those which are necessary to enable them to exercise their granted powers and effectuate their purposes. Such corporations can be created only by the legislature, and the legislature cannot delegate the power to any subordinate tribunal or board unless authorized to do so by the state constitution; and such corporations are subject to supervision and control by the legislature except to the extent that the legislature is restricted by the federal and state constitutions and by the nature of the rights and powers of the corporations.[54]

Summary

The Constitution of the United States "in all its provisions, looks to an indestructible Union composed of indestructible states."[55] The Government of the United States has only those powers which have been expressly and impliedly delegated to it in the Constitution of the United States; whereas the state governments have those powers which have not been granted to the federal government and which have not been denied to them by

53 Cooley, p. 13.

Quasi corporations are generally created for the administration of civil laws only, whereas municipal corporations often have the power and duty of administering criminal laws. Further, quasi corporations do not possess all the common-law powers implied from and incidental to corporate existence, but such only as are implied from the powers expressly granted, and the duties imposed upon them by statute or usage. See Cooley, p. 501.

54 See Cooley, pp. 67–73.

55 Texas v. White, 7 Wall. 700, 19 L.Ed. 227, 1868.

the federal and state constitutions. The United States and the several states are distinct political organizations supplementary of each other and equally supreme in their separate, appropriate jurisdictions.

SOVEREIGNTY IN THE UNION

20. Sovereignty in the States and in the United States resides in the people who are qualified electors.

In general

The constitutions in the United States are ordained, amended and revised by this sovereign power operating directly from the electors, or indirectly through representatives chosen by them, and all governmental officers of the states and of the United States are selected either directly or indirectly by the electors. Such officers are agents or representatives of the people, with whatever governmental functions and powers the people have delegated or permitted to them, but they do not have sovereign power. The sovereign power always remains with the electors.

The Right of Suffrage

The federal constitution[56] provides that, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude;" and, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex,"[57] but it does not confer the electoral franchise on anyone. The right of suffrage is left to be fixed and regulated by the several states, subject to these restrictions, and it is conferred, limited, or withheld at the pleasure of the people acting in their sovereign capacity. Generally, the qualifications of electors are fixed by the state constitutions.

56 Am. 15, U.S.C.A.Const.

57 Am. 19, U.S.C.A.Const.

CITIZENSHIP AND NATURALIZATION

21. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[58]

Citizenship

A person may be at once a citizen of the United States and of a particular state, and most citizens of the former are citizens of some particular state, owe allegiance to both governments and are entitled to the protection of both governments.[59] "The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within a state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual."[60] Consequently a person may be a citizen of the United States without being a citizen of any particular state, and this is the status of citizens permanently residing in the District of Columbia.[61]

Citizens of the United States include all persons born in the United States and not subject to any foreign power;[62] children born out of the limits of the United States whose fathers or mothers are citizens;[63] minor children of alien parents who become naturalized; and, persons who become naturalized.[64]

Naturalization

The Constitution of the United States[65] specifies that the Congress shall have power to establish "an uniform rule of naturalization," and this power is exclusive, but the states may legislate on the subject of aliens and their rights and disabilities, subject to the provisions of treaties, and a state can invest aliens with the privileges of its own citizenship although it cannot make them citizens of the United States. "Naturalization can be effected in at least four ways. First, by the grant of the privilege to certain named individuals. Second, under general laws of which any person who fulfills the requisite conditions may avail himself. Third, when the United States acquires territory formerly belonging to a foreign power, with its people, the latter may thereupon become citizens of the United States. Fourth, there may be a collective naturalization upon the admission of a territory to statehood, including all those who are resident in the territory and included in the new political community, but who were not previously citizens of the United States."[66]

No state can make or enforce any law which will abridge the privileges or immunities of citizens of the United States;[67] and the citizens of each state are entitled to all the privileges and immunities of the citizens of the several states.[68]

58 U.S.C.A.Const., Am. 14, § 1.

59 See Black, pp. 634, 635.

60 United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588, 1875.

61 Black, p. 635.

62 R.S. § 1992, 8 U.S.C.A. § 1.

63 See R.S. § 1993, Mar. 2, 1907, c. 2534, §§ 6, 7, 34 Stat. 1229, as amended June 10, 1933, Ex. Or. 6166, § 14, May 24, 1934, c. 344, § 1, 48 Stat. 797, 8 U.S.C.A. § 6, and conditions therein.

64 See Act of Mar. 2, 1907, c. 2534, § 5, 34 Stat. 1229, as amended May 24, 1934, c. 344, § 2, 48 Stat. 797, 8 U.S.C.A. § 8, and conditions therein.

65 Art. 1, § 8, cl. 4, U.S.C.A.Const.

66 Black, pp. 241, 242.

For statutes treating of naturalization see, 8 U.S.C.A. § 351 et seq.

67 U.S.C.A.Const., Am. 14, § 1.

68 U.S.C.A.Const., Art. 4, § 2.

CHAPTER 4

FORMS AND LEADING SYSTEMS OF LAW

FORMS OF LAW

22. The laws of a state may be authoritatively formulated in two ways:

(a) By judicial decisions, and

(b) By legislative enactments.[1]

Decisional Law

The decisional law of a state is that part of its positive law which has been formulated, or, more particularly, originated by courts in their decisions of cases.[2] The judicial power "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[3] And, ordinarily, a court reaches its judgment by the application of existing law, but when a case is presented for which there is no existing rule the court must either refuse to decide it or else formulate a new rule for its determination. If the latter course is pursued the process is judicial legislating and the result is a decisional rule of law. A great deal of Anglo-American law consists of rules produced by the judiciary, particularly during that stage of history when the fundamental principles of such law were being evolved and before the system thereof was developed to the point where the functional divisions of government acquired recognized signification and the legislative, judicial, and executive powers became vested in distinct and comparatively exclusive departments. These decisional rules have been molded, largely, from the customs and beliefs of the people and have been formulated by the courts to meet needs crystallized in cases brought before them.[4]

[1] Enacted law, or that law of a state which is formulated by legislation, is the subject of Chapter 6, infra.

[2] The term "decisional law" has been borrowed from Bowman and is used here because of its descriptive force. This form of law, as it exists in the United States, is more commonly designated as common law, unwritten law, case law, courthouse law, or judge-made law. However, the term "unwritten law" is misleading because decisional law is written to the extent that it is contained in printed reports of adjudications and comments upon it; and the term "unwritten law," if used in reference to the law of a state having an "unwritten" constitution, may include more than just decisional law as an unwritten constitution may consist in part of enacted law. On the other hand, the terms "case law" and "judge-made law" may be used to include interpretations by the courts of enacted law, and, "the case law that is produced by way of judicial interpretation of the enacted law, though decisional in its form, is merely the enacted law as authoritatively determined by the courts." Bowman, p. 211.

[3] Miller, Const. U.S., p. 314; Black's Law Dictionary, p. 1033.

ROMAN CIVIL LAW

23. The Roman Civil Law, formulated by judicial decisions and legislative enactments, and the English Common Law, constitute the two most influential systems of municipal law. The former is that system which was developed into the law of the Roman Empire.[5]

"Between them these two systems cover nearly the whole of the civilized, and most of the uncivilized world. Only two considerable masses of population stand outside—the Muselman East, that is, Turkey, North Africa, Persia, Western Turkistan, and Afghanistan, which obey the sacred law of Islam, and China, which has customs all her own. * * * [These] two systems, which had their origin in small communities, the one an Italian city, the other a group of Teutonic tribes, have been extended

[4] "Courts at the present time, however, do not make law freely and at large, as does a legislature. Their primary function is to decide cases and any new rules which they may adopt or originate in doing so are in the nature of a by-product of the decision. In changing old or making new law, they are not free to follow their own ideas of what would make for popular welfare. They are confined to the consideration of the case in hand, and in deciding it they are restrained and circumscribed by any applicable statute, established common-law principles and the traditional technique of judicial action. Their chief means of developing new law is that of extending the existing law by analogy to new situations. * * * Although formerly much controverted, the fact is becoming generally recognized that courts do, in this manner and to this extent, make law." Bowman, p. 56.

[5] "Civil Law," "Roman Law," and "Roman Civil Law" are convertible terms meaning the same system of jurisprudence, but the term "civil law" is also used to denote "that division of municipal law which is oc-

over nine-tenths of the globe."[6] The Roman civil law (*jus civile Romanorum*) originated in the primitive customs of the prehistoric city of Rome, and after centuries of development culminated in a code compiled and given legislative enactment during the reign of Justinian (527 to 565 A.D.).[7]

It has been said that the Roman system of law "begins, as it ends, with a code,"[8] a "code" being "a systematic restatement in statutory form, with or without revision, of a body of law which has previously existed wholly or partly in non-statutory form."[9] In about 450 B.C., the law of Rome was given the contour of a code by the enactment of the Twelve Tables and these were regarded as the base of Roman law down to the Code of Justinian. The reign of Justinian began in 527 A.D., and at that time the law was composed of two accumulated masses: the *jus vetus*, or old law, the development of which had been completed in the third century A.D., and the *jus novum*, or new law, which had been developed by subsequent judicial decisions and legislative enactments. The jus vetus included: (1) the primitive *jus civile*, based on custom and the Twelve Tables; (2) the statutes (*leges and plebiscita*), enacted by the popular assembly during the republic; (3) the annual decrees (*edicta*), dating from the

cupied with the exposition and enforcement of civil rights as distinguished from criminal law." Black's Law Dictionary, 3d. Ed., p. 332.

6 Bryce, Studies in History and Jurisprudence, p. 74. But see, Amos, Roman Civil Law, p. 415, "Mohammedan law is nothing but the Roman law of the Eastern Empire adapted to the political conditions of the Arab dominions."

"The total population of the earth is some 1800 millions; the Anglican system now shapes the legal relations of some 300 millions of persons; the Romanesque, of some 300 millions; and the Mohammedan, of some 250 millions; or between the three, about one-half of the world's population in all. All three systems have shown themselves strikingly adaptable, each in its own way, to its opportunities. Doubtless the most meritorious and adaptable will expand and survive the longest." Wigmore, Panorama of the World's Legal Systems, Library Ed., pp. 1106–1108.

7 "Roman history is usually divided into the following periods: (1) The kingdom (753–509 B.C.); (2) the republic (509–27 B.C.); the 'republican' empire, or principate, from Augustus to Diocletian (27 B.C.–284 A.D.); (4) the 'monarchical' empire, or dominate, from Diocletian to the removal of the capital to Byzantium (Constantinople) under Constantine (284–364); (5) the 'dual' monarchical empire, in the East and in the West, from the removal of the capital to the fall of Rome (364–476); (6) the Eastern Roman Empire, from the fall of Rome to the fall of Constantinople (476–1453); (7) the medieval Western Roman Empire, from Charlemagne to Napoleon (800–1800)." Bowman, p. 126, note.

8 Maine, Ancient Law, p. 1.

9 Bowman, § 70, p. 125.

time of the republic, promulgated by the praetor, the supreme judicial magistrate of the republic elected annually; (4) the acts of the senate (*senatus consulta*), enacted near the end of the republic and during the first two centuries of the empire; (5) the judicial decisions and statutes of the early emperors (*decreta, rescripta, mandata,* and *edicta,* usually referred to by the general term "constitutions"); and, (6) the opinions of the jurists (*responsa prudentium*), dating from the latter period of the republic and from the early empire and ending early in the third century A.D. The *jus novum* included the decisions rendered and statutes enacted under the emperors from the third century to the time of Justinian.[10]

The Code of Justinian was a consolidation of the law from the time of the Twelve Tables and consisted of three parts: the Code, the Digest, and the Institutes. The Code (in twelve books) issued first in 528, and revised in 534, was a collection of the decrees of the various Roman emperors from Hadrian (117–138 A.D.) to Justinian. "When issued, they were in most cases not intended as legislation, but as published in the Code, they were given full legislative force."[11] The Digest (in fifty books) consisted of excerpts from Roman legal writers, the earliest writer included being Quintus Mucius Scaevola, the teacher of Cicero who wrote about 100 B.C., and the latest one being Charisius, who wrote about 300 A.D. The greatest part of the Digest was from the works of Papinian, Ulpian, and Julius Paulus, all of whom wrote in the half century ending in 230 A.D. The writers included "were in nearly all instances practising lawyers who, however, performed a function much like that of the judges in Common Law courts. Their opinions were cited as authoritative in specific cases. A very large part of the Digest is therefore, strictly speaking, case law, in which the decision has been generalized, but in which the factual basis is significant and determining. * * * Although the Digest is sometimes 'case law' and sometimes purely doctrinal and historical exposition, its publication was intended to give the whole huge mass the force of a

10 From the time the Twelve Tables were enacted to the reign of Justinian the imperial part of Roman law had been compiled unofficially by the jurists Gregorius and Hermogenianus in the third and fourth centuries, and officially by the emperor Theodosius II in the fifth century. These three codes were imitated in the legislation of the barbarian kingdoms in the West and prepared the way for larger reception of Roman law later.

11 Radin on Anglo-American Legal History, p. 111.

legislative enactment."[12] The Institutes (in four books) consisted of material intended as a text for students and constituted an introduction to the remainder of the compilation, being a summary of the law set forth in the Code and Digest.

Supplementary of the Code, the Digest, and the Institutes are the Novels (*novellae constitutiones post codicem*). These are the laws and decisions made during the reign of Justinian after the completion of the Code. The Novels were never officially collected but were added to the other parts of the Code by jurists of the Middle Ages and the whole entitled *Corpus Juris Civilis* (body of civil law). "During the Dark Ages Roman law declined, both in the East and the West, almost to the point of extinction, but a renewed study of the *Corpus Juris Civilis* began in Italy near the end of the eleventh century and spread rapidly over Europe. From the twelfth to the nineteenth century, Roman law, in some form, was gradually absorbed into the local law, or was received in partial displacement of the local law, in most of the states of Europe, and during the era or colonization it was carried by the colonizing nations to many parts of the world."[13]

The French Civil Code, 1804, often called the "Code Napoleon," and the German Code, 1900, were founded upon Roman law. However, the law of Rome has been supplemented by principles from the canon law and the law merchant and has not been adopted without modification; and although it has profoundly influenced the Anglo-American system, Roman law does not have either the practical or the historical importance in the common-law countries that it has elsewhere as it was never received in England as it was in other countries.[14]

[12] Radin on Anglo-American Legal History, p. 112.

[13] Bowman, § 71, p. 132.

With modification and in new form Roman law "is now in force in continental Europe (including Turkey), Scotland, most of Africa, Ceylon, the East Indies, Central and South America, Quebec, Louisiana, the Panama Canal Zone, Porto Rico, [now Puerto Rico], Hawaii, and the Philippines. It has also been adopted, in part, in Japan. Change of sovereignty since its establishment has not in general changed the existing basis of civil law, although it has modified the methods of its administration." Bowman, p. 136.

[14] See Radin on Roman Law, pp. 97–101, 477–479; and, Radin on Anglo-American Legal History, pp. 117, 118.

THE COMMON LAW

24. The Common Law consists of legal precepts adopted, developed, and formulated by the decisions of the courts of England following the Norman Conquest.[15]

Historical

England is the only nation in western civilization except Rome that has evolved an independent system of law. This law has its remote original in the Teutonic, tribal customs of the Angles, Saxons, Jutes, and Frisians who left their ancestral homes in northern Germany and settled the greater part of Britain during the fifth and sixth centuries. A second strain of Teutonic customs was added with the invasions of the Danes in the ninth century, and a third by the conquering Normans whose customs were basically Teutonic although they contained principles derived from the Franks, or French.

Prior to the Norman Conquest in 1066, "there were three main bodies of customs in the loosely joined English kingdom: Mercian law, Wessex law, and Dane law, each having a distinct territory wherein it prevailed, though with innumerable local variations. While there were many features common to all of them, they differed in detail from one former kingdom to another, from

[15] "The term 'common law' is used, in varying senses, to designate: (a) Anglo-American law in its entirety, as distinguished from the Roman or other legal systems; (b) the decisional or case-law element of Anglo-American law as distinguished from the enacted element; (c) the decisional law applied by the English courts of law (King's Bench, Common Pleas, and Exchequer) and modern courts of like jurisdiction, as distinguished from the decisional law applied by courts of equity, admiralty, ecclesiastical courts, etc.; (d) the older law in England and America, as distinguished from provisions introduced in recent times by statutes or judicial decisions.

"It will be observed that the first of these meanings includes both enacted and decisional law, the second excludes enacted law but includes the decisional law of all courts, the third includes the decisional law of certain courts, to the exclusion of that of others, and the fourth refers somewhat vaguely to both enacted and decisional law.

"The use of the term 'common law' in so many different yet related senses is at first confusing, but by giving attention to the context in which it appears the particular meaning intended is usually perceived. Considered in the light of their historical background, such contrasting terms as common law and civil law, common law and equity, common law and statute law, common law and modern law, are readily intelligible, although the meaning in each case is different." Bowman, § 102, p. 205.

county to county, almost from village to village. The ancient customs of the tribes were breaking up into the customs of localities and neighborhoods. The English state was hardly more than in embryo, and the executive or sanctioning power was but weakly developed. There were no distinct judicial tribunals."[16] However, a gradual unification of the law and its administration began after the Conquest, as the Normans innovated centralized government. They confirmed the existing laws and customs to the extent consistent with Norman rule, and the communal courts were permitted to continue, but a national control of public affairs was initiated and the decisions of the existing tribunals were gradually subjected to the reviewing authority of newly commissioned royal courts. This systematization was also furthered with the development of such institutions as the King's council, the king's inquest, the doctrine of the king's peace, and the king's writ.

The King's Council

The king's council, or councils, consisted of two bodies; the great council (*Curia Regis*), composed of the king and his chief tenants, the great feudal landholders; and the smaller, select council or curia composed of the king's intimates who managed his estates and household. During Norman times the former group exercised the entire powers of government, and, as Parliament developed out of its activities, it became the House of Lords. Out of the select council, during the twelfth and thirteenth centuries, arose the courts of Common Pleas, King's (or Queen's) Bench, and Exchequer.[17] It was these courts that formulated most of the common law.

The King's Inquest

The king's inquest was an official method of finding facts by the summoning of persons to give upon oath true answers to questions asked them. Used at first for administrative purposes, it was later made a regular method for determining disputed questions in judicial proceedings and from it developed the modern jury trial.

The King's Peace

A principle of the Anglo-Saxon law was the recognition of various truces pertaining to certain places, times, or persons, and

16 Bowman, p. 141.

17 See Bowman, pp. 153–157; and Radin on Anglo-American Legal History, pp. 44–66.

of these were the king's peace, the peace of the church, and the truces of different communal courts. Acts done in violation of the king's peace were claimed to be within the jurisdiction of the king's court, and consequently the conception of the king's peace was gradually broadened so as to bring the violations of other truces thereunder, thus increasing the power of the king's court and reducing the authority of other tribunals.

The King's Writ

Originally, writs were the executive orders of the king commanding acts to be done by the royal officers or lords, but their uses were expanded until, under Henry II (1154–1189), writs were employed to direct the work of the king's judges and to authorize private persons to bring actions before them. Finally, writs became the process by which all actions were commenced in the king's court. These writs specified with some particularity the nature and subject-matter of the action to be brought, gave the court jurisdiction thereof, and ordered the sheriff to compel the defendant to appear. Writs so used to originate actions acquired the title of "original" writs. They were prepared by and obtained from the king's chancery or secretarial department at the head of which was the chancellor. Most of the writing done in the name of the king, including the drawing and issuance of writs, came under the supervision of the chancellor as it was he who was charged with the duty of keeping the great seal with which official documents had to be impressed. The chancellor was also the permanent representative of the king in his *Curia*. "The authority to make writs gave the early chancellors, and hence the king, a large control over the rights which might be recognized by the judges; the power to make new writs, and hence new remedies, was a power to make new rights, and hence new law."[18] Awarded at first according to the apparent justice and needs of the case, writs were later granted only according to precedent, but those writs which were established by precedent came to be issued as a matter of course and hence known as "writs *de cursu*" (or of course). The power of the king over the issuance of new original writs had met opposition and an attempt had been made in the Provisions of Oxford of 1258, forced upon Henry III as a result of the Baron's War, to prevent the creation of writs not *de cursu* except by vote of the Great Curia (Parliament). But, "when Edward I in 1285 issued his second group of miscellaneous ordinances in the form of the

18 Bowman, p. 161.

Statute of Westminster II, [13 Edw. I, c. 24] it was specially provided that the Chancellor might issue writs *in consimili casu sub eodem iure cadente*, 'in situations that are similar to those already actionable by writ, and that fall under the same legal rule.' "[19] Cases not "similar to those already actionable by writ" were directed to be referred to Parliament.

Custom

The pre-existing customs were a very fruitful source of the early common law. Many of these were adopted with or without modification by the king's judges as rules of decision. Prior to the Norman Conquest the local courts had applied customs as rules, but the customs varied in different localities, and although the king's judges after the Norman invasion professed to administer "Custom of the Realm," there was, actually, no body of custom common to all of England. "The truth, therefore, seems to be that the royal judges, purporting to administer a common law which had only a fragmentary existence, in reality made such a law in the exercise of authority derived from the king."[20] But, out of the many divergent pre-existing customs, the king's judges built up a uniform system of law enforced throughout the kingdom, and because its administration was general rather than local it became known as the "Common Law" during the reign of Edward I (1272–1307).

Stare Decisis

Early in their history the king's judges, consciously or unconsciously, tended toward a routine which contributed greatly to the establishment of uniformity in the law. This routine was that of referring to prior decisions of cases similar to a case to be decided for the purpose of learning what custom or rule may already have been determined as applicable to such a situation.[21] Reliance upon previous decisions for the ascertainment of ap-

[19] Radin on Anglo-American Legal History, p. 186.

The feudal system, an institution that also aided considerably in the achievement of uniformity in the law of England and in the centralization of its administration is discussed in a following chapter. See § 44, infra.

[20] Bowman, p. 172.

[21] Early judicial records of which diverse research use could be made included: the Pipe Rolls (from 1130) of the Exchequer, but which were little more than evidence of debts due the king; the Plea Rolls (from 1194) which were memoranda of the Court of Common Pleas made by the court clerks; and, the Year Books (from the reign of Edward I) which apparently began as notes about procedural points occurring in the royal courts. See, Radin on Anglo-American Legal History, pp. 309, 310, 312, 313.

plicable rules became a judicial habit and finally a custom or rule in itself "based upon the importance of certainty and stability in the law and the necessity of preserving rights and titles vested, and contracts made, on the faith of judicial decisions which were, at the time, accepted as correct expositions of the law."[22] This habit which became a rule is now stated in the maxim, "*stare decisis et non quieta movere*;" and, more fully expressed, means that "when a point or principle of law has been once officially decided or settled, by the ruling of a competent court in a case in which it was directly and necessarily involved, and more especially when it has been repeatedly decided in the same way, it will no longer be considered as open to examination, or to a new ruling, by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases; ordinarily the rule so established will be adopted in all subsequent cases to which it is applicable, without any reconsideration of its correctness in point of law. * * * Adherence to judicial precedents is a cardinal principle in jurisprudence; and it is upon this basis that the whole elaborate structure of our case-law has been built up."[23]

The combined effect of the restrictions imposed by Parliament upon the writ making power of the chancellor and the limitations which naturally resulted from the application of the *stare decisis* or precedents doctrine, was an inflexibility in the common law system. Its rules became fixed and rigid and its methods inadequate. It could not be adjusted to resolve conflicts between new interests which arose as society progressed, and injustices resulted. To alleviate these injustices, legal fictions were evolved, the equity system was developed, and legislation was resorted to.[24]

[22] Black's Law of Judicial Precedents, p. 184.

According to Blackstone, "it is an established rule to abide by former precedents where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments, he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." 1 Bl. Comm. 69.

[23] Black's Law of Judicial Precedents, pp. 182, 183.

[24] The equity system and legislation are the subjects of subsequent chapters; see, respectively, cc. 5, 6.

Legal Fictions

A legal fiction "is an assumption or pretense that a state of facts is true, without regard to its actual truth or falsity, employed by a court as a means of evading, restricting, or extending a rule of law while preserving the appearance that it remains unchanged;"[25] it is "an assumption, for purposes of justice, of a fact that does not or may not exist."[26] The history of the action of trover demonstrates how a legal fiction may arise. Originally this action could be brought only by a loser of goods to recover their value from a finder who refused to surrender them upon demand. Later, however, when necessity required it, the action of trover was permitted to be brought against defendants who had obtained the goods by force, theft, fraud, or by any other manner. The allegation of a loss and finding would still be made but the defendant would not be permitted to deny the allegation, whether or not it was true. Thus, the "loss and finding" became a fiction and the action of trover a means of relief which, but for the fiction, could not otherwise be obtained. Other examples of fictions are found in the doctrines holding a husband and wife to be one person, and the act of a servant to be the act of his master. "In making use of fictions, the courts took what was for them the line of least resistance, and made important and wholesome and often long overdue reforms in law without obviously disclosing the fact that they were doing so. * * * It seems clear, however, that fictions are wholly out of place in modern law."[27]

Legal Systems Merged with the Common Law

In the course of its development large portions of the maritime law, the law merchant, and the canon law became merged with the common law. Until their consolidation with the common law, these were separate legal systems, of independent construction.

Maritime Law

Maritime law is "that system of law which particularly relates to the affairs and business of the sea, to ships, their crews and navigation, and to marine conveyance of persons and property."[28] It is international in character. The modern maritime

25 Bowman, § 94, p. 184.

26 Black's Law Dictionary, pp. 772, 773, citing, Dodo v. Stocker, 74 Colo. 95, 219 P. 222, 223, 1923.

27 Bowman, pp. 186, 187.

28 36 C.J. § 10, p. 960.

"Maritime law is that part of municipal law which relates particularly to traffic and business on the sea and other navigable waters, to ships, their crews and navigation, to marine contracts, torts, crimes, and property, to marine transportation of persons and property, and to water-borne commerce in general." Bowman, § 67, p. 121.

29 In the latter part of the nineteenth century, the High Court of Admiralty was made a division of the High Court of Justice.

law of England, except for some statutory alteration and modification that has been made from time to time, has been developed by the courts principally since the fifteenth century from maritime and commercial rules of trade which were in general use among mariners and traders in the early Middle Ages.

When commerce began to revive along the northern coast of the Mediterranean after the fall of Rome, a need arose for tribunals to decide disputes growing out of maritime and commercial interests, and as the rulers and people at large were indifferent to this need, the traders themselves established in each of the principal maritime cities "Courts of Consuls" with authority to adjudge their controversies. During the twelfth and thirteenth centuries such courts were set up in ports and trading cities throughout Europe and eventually became known as "admiralty courts" when, with the maturity of the political organizations of the different states, the courts of consuls were placed under maritime officers called "admirals." Local maritime courts were instituted in England at about the same time as in other trading countries, but they lost authority in the fourteenth century when the admiral of the fleet and his deputies were granted jurisdiction in maritime cases. This departure was given greater distinction in the fifteenth century during which the separate admiralty courts that had arisen were consolidated into the High Court of Admiralty.[29] The maritime law of England is less international in character than that of other countries as that part of it taken over by the common-law courts was modified by them and given a similarity to the remainder of the common law. However, that part of it which was left to the admiralty court resembles more the general maritime law of the world.

The Law Merchant

The law merchant or mercantile law, has been defined as that system of rules, customs, and usages generally recognized and adopted by merchants and traders, and which, either in its simplicity or as modified by common law or statutes, constitutes the law for the regulation of their transactions and the solution of

their controversies.[30] Originating in trade customs, the law merchant came to be observed internationally by merchants and mariners, and during the Middle Ages was administered by special maritime and commercial courts. It comprised both maritime and commercial regulations and applied peculiarly to merchants.

In England, the law merchant was first applied as in other countries by local maritime and commercial courts, but the courts of admiralty after their creation took over the maritime part of it leaving that portion which was commercial in character as a separate legal system for merchants only. This system was administered by special courts down to the seventeenth century when the common-law courts began a gradual adoption and modification of it which continued until, in the middle of the nineteenth century, the law merchant and the common law became completely fused.

The law merchant or commercial law in the United States has been developed within the frame of the common law, as it has in England since the two systems were merged, and much of it has been codified into statutes in both countries. For example, the modern English Law of Bills and Notes, and the Sales of Goods Act represent codifications of portions of the law merchant; and the same is true of the Uniform Negotiable Instruments Act, and the Uniform Sales Act which have been adopted by many States in the Union.[31]

The histories of modern commercial law and modern maritime law are quite analogous because of their original sources and their mutual purposes of trade regulation; but they differ generally in that the former is more primarily concerned with business transactions on land and within a nation, whereas the latter is concerned with transoceanic business and with affairs and relations more often international.[32]

The Canon Law

The canon law was primarily the law of the Church of Rome administered by the courts of that church throughout western

[30] Black's Law Dictionary, 3d. Ed., p. 1179.

[31] See Radin on Anglo-American Legal History, p. 500.

For lists of the jurisdictions in which the Uniform Negotiable Instruments Act and the Uniform Sales Act have been adopted, see the appendix.

[32] For a succinct historical treatment of "The Sea Law and the Law Merchant," see Radin on Anglo-American Legal History, pp. 486–501. See also, Wigmore, Panorama of the World's Legal Systems, Library Ed., pp. 876–925.

Europe, including England. It consisted of papal decrees and synodical canons.[33] In England, after the Conquest and as a result of an ordinance of the Conqueror, the canon law was applied by an hierarchy of church courts which looked to the spiritual sovereignty of the pope rather than to the secular sovereignty of the king. These church courts antedated the king's courts in development, and during the height of their power, when they had jurisdiction over all matters of a spiritual nature and such other matters as they considered to concern the economy of the church and the morals of the people, they controlled wills of personal property, the settlement of the estates of decedents, marriage, divorce, charges of felony against clerics, and such offenses of the laity as perjury, usury, adultery, fraud, and defamation. However, in the sixteenth century, during the Reformation and the reign of Henry VIII, the king was declared to be "the only supreme head in earth of the Church of England,"[34] and thereafter church law in England was applied by the courts of the English church. But after the Reformation they were gradually denied secular authority. "Statutes in the reigns of Henry VIII and Elizabeth deprived them of their jurisdiction in cases of crime committed by the clergy. In the following century their jurisdiction over perjury, fraud, and defamation was taken away. In 1857 their jurisdiction in matrimonial, testamentary, and probate matters was transferred to newly created civil courts. All that remains to the church courts at the present time is a corrective jurisdiction over the clergy and the regulation of the internal discipline of the Church of England; and even this is subject to the supervision of Parliament."[35]

As the jurisdiction of the church courts was diminished, the secular portion of the law they had administered was taken over by the common-law courts with the consequence that much of the modern law regulatory of probate matters, the administration of estates, marriage and divorce is based on principles settled by the ecclesiastical courts during the period they controlled such subjects.

[33] During the thirteenth and fourteenth centuries the canon law was compiled and from the sixteenth century this compilation has been known as the *Corpus Juris Canonici*. See Radin on Anglo-American Legal History, pp. 103, 104; and Bowman, p. 201.

[34] Statute, 26 Hen. VIII, c. 1.

[35] Bowman, p. 202.

Common-law Countries

The common law has spread to many parts of the world. It prevails in England, Ireland, and Wales, the United States (except Louisiana, Puerto Rico, the Panama Canal Zone, and Hawaii), Canada (except Quebec), Australia, New Zealand, India (except Ceylon), Gibralter, and in many islands. In the excepted places listed the existing Roman civil law is gradually undergoing modification by modern legislation and by the administration of common-law judges.

COMMON LAW IN THE STATES

25. The basis of the law in every State of the Union, except Louisiana, consists of the English common law, equity, and statutes in effect at the time of the colonization of America and their interpretation by the English courts, with such modification as has been deemed wise and necessary to meet local needs and conditions.[36]

In General

The laws of the States and of the United States have been erected by legislation and decisions upon the foundation furnished by English law, as the colonies that formed the United States were subject, generally, to such law, but "the common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed them as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."[37]

The constitutions of many of the states contain provisions specifically adopting the common law "and in doing so frequently refer to the 'Common Law of England' as it existed at a certain date. This date is usually the date of the Declaration of Independence. But in many instances the date set is the 'fourth year of reign of James I,' i. e., 1607, the date of the founding of the first permanent English colony in North America. This is the

[36] The common law is the basis of the criminal law in Louisiana, but the civil law of such state is based upon Roman law as modified by France. "As that state was a French province at the time of its acquisition, and therefore subject to the Roman civil law in its French form, the same reasons which led to the adoption of the common law in the other states induced the adoption of the civil law of France as the basis of its legal system." Bowman, p. 208.

[37] Van Ness v. Pacard, 2 Pet. 137, 144, 7 L.Ed. 374, 1829.

case in Virginia, Illinois, Indiana, Colorado and other jurisdictions. Usually, the statement is qualified. The Common Law is adopted only 'so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws' of the particular states."[38] In some states English statutes enacted after July 4, 1776, are rejected; in other states, statutes enacted in England after 1607, are rejected; in others, no such date is given. Those states which have not adopted the common law with their constitutions have done so either by statute or judicial decision. "These variations, however, seem to have produced no substantial difference in the actual course of judicial decisions. In all states, the acceptance or rejection of specific provisions as applicable or not applicable to local conditions has been the work of the courts; in all states, English decisions, from the most ancient to the most recent, are treated with respect as enunciations of the law which has been adopted, though not regarded as absolutely binding; in all states, most of the English statutes in effect at the beginning of colonization, and few or none passed subsequently, are in force without reenactment by the state legislature; and in all states, the original inheritance of English law has been profoundly modified by legislation or judicial decisions. There are thus as many state systems of common law as there are states, all manifesting a general likeness because of their common origin and extensive borrowing from each other, yet diverging from English law and from one another in many particulars."[39]

Admiralty

Vice-admiralty courts commissioned by the king exercised jurisdiction over maritime cases in the colonies prior to the Declaration of Independence, but this jurisdiction was delegated to the federal courts when the Union was established, the Constitution of the United States[40] providing that, "The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction." Therefore the admiralty law of the United States is administered by the federal courts uniformly throughout the nation as a distinct, independent legal system.[41]

[38] Radin on Anglo-American Legal History, pp. 341, 342.

[39] Bowman, pp. 207, 208. See, also, Pope, English Common Law in the United States, 24 Harv. Law Rev. 6, 1910.

[40] Art. 3, § 2, U.S.C.A.Const.

[41] "Article 3, § 2, of the Constitution extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction'; and Article 1, § 8, confers upon the Congress

Ecclesiastical

The canon law has never been in force in any State because of the total separation of church and state in the United States and the lack of ecclesiastical tribunals to administer such law. However, various subjects which were originally adjudicated in ecclesiastical courts, particularly matters such as probate, marriage, and divorce, have been placed by statutes within the jurisdiction of courts of the States and the courts have construed these statutes as authorizing them to adopt such of the principles and practices of the English ecclesiastical courts as are not inconsistent with American law and institutions.[42]

Federal

A federal statute provides, "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply;"[43] and, in construing this statute, the Supreme Court of the United States has said, "Except in

power 'To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900, 1917.

[42] "In the American colonies, the English Canon Law as regulated by the statutes of Henry VIII and subsequent amending acts had a certain limited validity in these colonies in which, like Virginia, the Anglican communion was officially recognized. It had, of course, no validity in the Puritan colonies of New England where an attempt had been made to create a new law based on the Bible as interpreted by the Puritan divines. * * * Echoes of Canon Law phrases, such as the famous distinction of Peter the Lombard between marriages *'per verba de praesenti'* [by words of the present tense] and *'per verba de futuro,'* [by words of the future tense] as well as such expressions as 'treating a spouse with conjugal kindness,' survive in our family law. 'Benefit of clergy' survived briefly in a few states, and remained in the formulas of statutes after it had been abrogated in fact. But, outside of these matters, the Canon Law can be discovered in the United States only in those institutions which had been almost wholly absorbed by the Common Law." Radin on Anglo-American Legal History, pp. 109, 110.

[43] 1 Stat. 92, R.S. § 721, 28 U.S.C.A. § 725. This statute was enacted in 1789, as § 34 of the original Judiciary Act by which the system of federal courts was organized.

matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."[44] Therefore, the initial phrase of the statute, "The laws of the several States," refers to both the statutory and decisional laws of the States, and "there is no federal general common law."

Summary

The highest court of a state in cases presented to it has the responsibility and power of making the final determination of what the controlling rule of the state is, whether the process involves the interpretation and administration of a statute or the selection and application of common-law principles, and in resolving controversies not within the ambit of federal regulation, the federal courts apply the governing rule of the state in which the case originates, whether it be a constitutional, statutory, or decisional rule; and, subject to final review and correction by the Supreme Court of the United States, the courts of the States apply the Constitution, laws, and treaties of the United States in all

[44] Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, 1938. This case disapproved and overruled the construction given the statute in the case of Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865, 1842, in the opinion of which Mr. Justice Story wrote: "In all the various cases, which have hitherto come before us for decision, this court have (*sic*) uniformly supposed, that the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern

cases presenting questions thereunder and not declared by the federal constitution or acts of Congress to be within the exclusive jurisdiction of the federal courts.

the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

For a discussion of the actual and probable effect of Erie R. Co. v. Tompkins, and its overruling of the doctrine of Swift v. Tyson which had stood for ninety-six years, see "The Collapse of 'General' Law in the Federal Courts," by Charles T. McCormick and Elvin Hale Hewins, 33 Ill. Law Rev. 126, 1938.

CHAPTER 5

EQUITY

THE GENERAL NATURE OF EQUITY

26. Equity, in Anglo-American law, constitutes the structure of legal materials supplementary of the common-law system that was developed and applied by the English Court of Chancery and the courts succeeding to its powers in the British Empire and the United States.[1]

Origin

In England, power to alleviate the strict rules of law where their application would result in injustice, originally vested in the king, became delegated to his chancellor and for this reason the precepts of equity in Anglo-American law were developed as a system distinct from the common law proper administered by a separate tribunal under the chancellor. As far back as English legal history can be traced the king exercised the prerogative of interfering with the ordinary legal procedure in special cases presenting needs requiring such interference, and consequently, after the common-law system had become quite settled, its original writs limited, and its remedies inadequate to meet the necessities of new circumstances, the council, as representative of the king, would often intervene in extraordinary cases upon being petitioned by the subjects affected. However, in the latter part of the fourteenth century, these petitions became too numerous for consideration by the entire council and the custom developed of referring them to the chancellor, the king's personal representative in the council, with the result that this function of the chancellor gradually developed into and became a separate institution recognized as the Court of Chancery. Thus, although separate, the

[1] "In the general juristic sense, equity means the power to mitigate the rigidity of the application of strict rules of law by a tribunal having discretion to adapt the relief to the circumstances of the particular case." McClintock on Equity, (hereinafter cited "McClintock"), § 1 (a), p. 1.

common-law and equity systems had a common origin and the authority of the common-law judges and the powers later exercised by the chancellor were derived from the same source, the king.[2]

Development of Equity into a System

The early chancellors were usually ecclesiastics educated in the canon law who professed to base their decisions on the law of God or conscience, but after the fall of Cardinal Wolsey in the reign of Henry VIII, most of the chancellors were lawyers.[3] Trained in the relatively rigid traditions of the common law and its stare decisis doctrine, the inclinations of these later chancellors caused the molding of equity into a structure with precepts almost as definite as those of the older system. Reports of the decisions in chancery began to be published, and although equity precedents never obtained the binding force of those in the common-law system, chancellors tended to follow the courses described and ascertainable in the records of their predecessors.

Quite naturally the common-law judges became jealous of and opposed to the extraordinary powers of the chancery, and "as equity came to be more clearly recognized as a separate system of law, and not merely an exercise of the king's prerogative of grace, the opposition of the common-law judges to it increased,

2 "The king is the fountain of justice, and general conservator of the peace of the kingdom. He is not the author or original, but only the distributor of justice. He is the steward of the public, to dispense justice to whom it is due. The original power of judicature, by the fundamental principles of society, is lodged in the society at large, but as it would be impracticable for the people in their collective capacity to render justice to individuals, therefore every nation has committed that power to magistrates, who with more expedition can hear and determine complaints, and in England this power is with the king and his substitutes. He, therefore, has alone the right of erecting courts of judicature, as he possesses the sole executive power, in which he is assisted by courts acting under his authority. Hence all jurisdictions of courts are derived from the crown; their proceedings were generally in the king's name; they pass under his seal, and are executed by his officers." Browne's Blackstone's Commentaries, pp. 86, 87.

3 Concerning the early chancellors, Bowman has written that they "based their equity upon the idea that the court should compel each individual litigant to do that which 'reason' and 'conscience' would dictate to a person in his situation. In accordance with this idea, the chancellor, as the purveyor of the king's royal prerogative of justice, was the 'keeper of the king's conscience,'" and, hence, during its early stages, the chancery was a "court of conscience." Elementary Law, Part I, p. 278.

especially when the chancellors began to enjoin the prosecution of actions at common law or the enforcement of common-law judgments. This opposition came to a head in the controversy between Coke and Ellesmere, the chancellor, in the reign of James I, when the common-law courts released on habeas corpus men imprisoned for contempt in violating an injunction against enforcement of a judgment, and even threatened the chancellor, as well as the parties who sought his help, with indictment under a statute forbidding any one to call in question a judgment of the king's court. The king appointed a commission, headed by Francis Bacon, to determine the question, and the report of the commission to the effect that the chancellor could enjoin a party from enforcing a judgment, but could not affect the judgment itself, nor the court which rendered it, furnished the formula under which the two systems were able to exist side by side in England until the powers of both the common-law courts and the chancellors were vested in the high court of justice by the Judicature Acts."[4]

Characteristics of Equitable Jurisdiction and Relief

"Jurisdiction" ordinarily means the power conferred on a court by sovereign authority to consider and determine causes according to law and to enforce its decisions, but "equity jurisdiction" ordinarily means, not the power of a court of equity to adjudicate a particular controversy, but the aggregate of the controversies in which the court may properly exercise its power to grant equitable relief. "If the controversy is one within the jurisdiction of the sovereign, the existence of jurisdiction over a particular controversy depends on the presence of two elements: Jurisdiction over the subject-matter; and jurisdiction over the object of the controversy, if the court is to act in rem, or over the persons of the parties, if it is to act in personam. Courts of equity, like all other courts, must possess jurisdiction in this sense or their decrees are nullities and may be disregarded with impunity or collaterally questioned in any subsequent proceeding."[5]

The jurisdiction of equity may attach in almost any branch of the law where the circumstances call for the exercise of its supplementary powers, but because of its relationship to the common law the jurisdiction of equity is ordinarily divided into three classes: concurrent jurisdiction; auxiliary jurisdiction; and, exclusive jurisdiction. Its concurrent jurisdiction includes all those cases in which the court of equity grants relief for the protection

4 McClintock, p. 6.

5 McClintock, p. 57.

of common-law rights where the common-law remedies for the protection of those rights are not adequate. Examples of such cases are suits for specific performance of contracts and for the prevention of torts to common-law property rights. Its auxiliary jurisdiction is available where equitable relief is needed to obviate some common-law rule of procedure which prevents the proof of a right infringed, although such right is recognized at common law and the common-law remedy for its violation is adequate. Examples are bills for discovery and to perpetuate testimony. The exclusive jurisdiction of equity includes those cases in which it recognizes and protects rights which are not recognized at common law; in other words, those cases involving so-called "equitable" as distinguished from "common-law" rights, such as trusts, equitable liens, and various other equitable estates and interests.

As it was administered by the chancellors, equitable relief may be distinguished from common-law relief in that the former was extraordinary, was granted only in the discretion of the chancellor, and was effectuated in personam and not in rem. These distinguishing features were the chief characteristics of equity relief. The historical principle that equitable relief could be obtained only in special cases where the common-law remedy was inadequate furnished the base for the characteristic that such relief was "extraordinary." Common-law remedies were characterized by their lack of variety, their fixedness and unchangeability, their lack of adaptability to new circumstances, and precise and technical rules which governed their use. Ordinarily they were confined to the recovery of a sum of money or the recovery of the possession of land or chattels. Thus, the common-law remedy could be inadequate either because the relief which the court was empowered to grant was not of the kind demanded by the situation; the amount of damages could not be determined with reasonable accuracy so that it could not be known if the recovery would be just; or, the procedure at law could not be adapted to meet the needs of the circumstances. In contrast, the equitable remedies were characterized by their almost unlimited variety and adaptability to different situations. Where the common-law court could allow only damages in money to a plaintiff for the refusal of the defendant to perform a contract, the chancellor could compel the defendant to perform or carry out his promise; where the law court could only order a defendant to surrender his possession of a tract of land or a chattel, the chancellor could compel him to do various other acts or restrain him from certain conduct.

That equitable relief was granted only "in the discretion of the chancellor" and could not be demanded as a matter of right, meant a "judicial discretion" to be exercised by the application of established principles of equity, and the adaptation of the remedy so as to accomplish the most equitable relief possible under the circumstances. Thus, the chancellor could not withhold or administer relief merely according to the dictates of his own conscience. The historical origin of the equitable powers of the chancellor in the king's prerogative of grace constitutes the background of the characteristic that the granting of equitable relief was "discretionary" with the chancellor.

By the principle that equity acted "in personam" and not "in rem," was meant that a decree of the chancellor would direct the various parties in a suit to perform such acts as were necessary for the accomplishment of justice under the circumstances, and if the parties disobeyed the decree they would be punished personally for contempt; whereas a court of law would have entered a judgment which would have been available against a defendant's property rather than against the defendant personally. "In modern times, the maxim that equity acts in personam has been used particularly in determining the territorial jurisdiction of courts acting as courts of equity, but there is a manifest tendency today to acknowledge the power of a court of equity to act in rem, even where it has not been expressly authorized by statute to do so. The doctrine, now apparently well established in this country, that a decree in equity on the merits is res judicata in a court of law, gives a wide effect to such decrees upon the purely legal rights of the parties. Other courts have directly held that the power to mold decrees to meet the needs of the parties justifies an in rem decree where that alone can give adequate relief."[6]

[6] McClintock, pp. 48, 49.

"In many cases, courts of equity have been empowered by statute to render decrees which shall operate in rem, especially with reference to titles to land; in other cases this power has been assumed without authority from a statute.

"While ordinarily the powers of the equity courts to give effect to their decrees by action in personam were more effective than action in rem would be, situations developed where it was ineffective. The first of these situations to demand legislative relief was where the legal title of a trustee became vested in one incompetent to act as trustee or to convey the legal title to a successor. The court of equity could appoint a successor to act as trustee, but it could not vest the legal title in him, nor could it order the title to be conveyed, since the holder had no power to convey. To meet this situation, statutes were enacted in England and this country empowering the court to make the conveyance, either by an officer appointed for that purpose, or

Equitable Doctrines

In granting equitable remedies, whether for equitable or legal rights, and in enforcing equitable rights, courts exercising equity jurisdiction base their actions upon distinctively equitable principles, rules and standards collectively called "doctrines," which are peculiar to equity and are not employed by courts exercising common-law jurisdiction except by imitation or unless they have been extended to such courts by statute. Among these "doctrines" are the equity maxims.

THE MAXIMS OF EQUITY

27. The maxims of equity are fundamental principles which have been formulated and declared by the courts of chancery and used by them as guides in the exercise of their discretion.

In General

The maxims are "historical expressions of the spirit and method by which, when the chancery was literally a 'court of conscience,' equity was extended to new species of wrong and injury."[7] However, "the main branches of equity jurisdiction were well established before the first attempt was made to state maxims of equity, and the list as then given differed greatly from the list as commonly given today."[8] The authorities are not in accord as to just what equitable precepts should be considered as maxims, but there is substantial agreement upon the following statements which, by reason of their nature, are divided into "enabling" maxims or those that impel the court to grant equitable relief, and "restrictive" maxims or those that cause the court to deny equitable relief or to deal with a matter in the same manner as a common-law court would deal with it.

directly by its decree. Similar difficulties arose in other cases, particularly with reference to contracts for the sale of land by nonresident vendors, so that general statutes were passed empowering the court to transfer land titles generally by action in rem, and also to terminate adverse claims thereto by decrees in rem.

"So long as courts of equity and of law remained separate, the former could not act in rem, in the sense of affecting by their decrees the rights of parties which would be given effect in common-law courts, unless that power was conferred by a statute or the common-law courts had voluntarily extended recognition. But, when the two systems are administered by the same courts, and especially when they are administered in the same proceeding under the codes, the reason for denying to courts of equity the power to act in rem no longer exists, and we find them undertaking so to act in a variety of situations." McClintock, § 37, pp. 55, 56.

7 Bowman, p. 285.

8 McClintock, p. 29.

THE ENABLING MAXIMS:[9]

(1) Equity will not Suffer a Wrong to be Without a Remedy[10]

This maxim is a key to the early equity system as the chancery court arose because of the inability of the common-law system to give full justice. It has operated to protect interests similar to interests previously recognized and protected by the judiciary but for which there was no exact precedent. In such cases chancery has given the relief required by the situation, where possible.

(2) Equity Regards that as Done which Ought to be Done

This precept is most often used "in connection with the principle of equitable conversion, by which equity adjusts the rights and obligations of persons with reference to a particular thing to conform to what they would have been had the direction of a will or contract for its sale been performed."[11] Generally, it applies "when the holder of the legal estate [in land] owes a duty, legal or equitable, to convey it to another or to hold it for his use and benefit. By treating what ought to be done by him as if it were already done, chancery gives the person to whom the duty is owed all the substantial advantages, and incidentally the burdens, of ownership, with the exception, of course, that he does not have the legal title. Thus, in the case of a contract for the sale of land, of such nature that each party is entitled to specific performance as against the other, the purchaser is regarded, from the moment the contract is made, as the equitable (though not the legal) owner of the land, and the vendor is regarded as the

9 The proverbs that "Equity acts in personam and not in rem," and "Equity acts specifically, and not by way of compensation," are listed by some commentators as enabling maxims, but according to others they are mere descriptions of the usual processes of equity rather than principles to be applied in the decision of controversies. See McClintock, p. 29, note.

10 The ordinary meaning of this maxim "must be greatly qualified if it is to be accepted as a statement of principle on which courts of equity act. Equity does not undertake to redress wrongs which are violations of moral, as distinguished from legal, obligations, but the final test to distinguish a legal from a moral obligation is whether it will be enforced, or at least recognized as binding, by courts." McClintock, p. 42.

11 McClintock, p. 30.

equitable owner of the money; the latter holding title to the land merely as a security for the payment of the money, and the former holding the money as security for the delivery of a deed to the land. This is one of the two forms of what is known as the 'equitable conversion' of land into money and of money into land. The interest of each party is regarded as subject to the rules governing the kind of property which he is entitled to receive from the other. In the absence of an agreement to the contrary, the purchaser is entitled to the possession of the land or to the rents and profits derived from it, and the vendor is entitled to interest on the unpaid money. If the purchaser should die before receiving the deed, his right to obtain title to the land passes as real property to his heir or devisee; and if the vendor should die before he receives the money, his right to demand payment passes as personal property to his executor or administrator. The second kind of equitable conversion occurs when a deed or will directs that land be sold for money, or that money be expended for land. Here, as in the previous case, the land in the hands of the trustee or executor is governed by rules applicable to personal property, and the money to be expended for land is governed by the rules pertaining to real property."[12]

(3) Equity Looks to the Substance Rather Than to the Form

In other words, an equity court in determining the rights of the parties to a transaction does not take the form thereof as conclusive but goes to the substance of it and administers relief on the basis of what the parties actually intended their relation to be. "Thus, a mortgage, at common law, is in form a conveyance, but courts of equity, looking to the substance, hold that it is merely a security, and that in consequence the mortgagor has an equity of redemption. An agreement under seal is binding at common law without consideration, but equity refuses to give specific performance of a sealed agreement unless there is a consideration. A deed defective at common law from lack of a seal or otherwise may be treated in equity as a contract to convey; and similarly a defective mortgage may be treated as an equitable lien. Agreements for money penalties and forfeitures of property for failure to pay money are enforced according to their letter at common law, but equity gives relief against them upon payment, with interest, of the amount actually due."[13]

[12] Bowman, pp. 290, 291.

[13] Bowman, p. 292.

(4) Equity Imputes an Intention to Fulfill an Obligation

Hence, when a person promises to do some act, equity will assume that he intends to do it until the contrary is shown and if he does something which may be regarded as a partial performance of his promise equity will so treat it. "It is a polite way of saying that, whenever a person is under obligation to appropriate property to a particular use, and has property which may be so appropriated, equity will compel him to make the appropriation."[14]

(5) Equality is Equity

That is to say, where either assessments or benefits must be distributed among several, equity will apportion them equally so far as possible. For example, in the settlement of the affairs of an insolvent partnership or corporation, surplus assets remaining after payment of secured or preferred creditors will be divided by equity among the unsecured creditors in proportion to the amounts due them; and if the estate left by a decedent is not sufficient to pay the debts and legacies in full, legacies of the same class will be reduced proportionately to provide for the payment of the debts. The principle has been incorporated in modern insolvency and bankruptcy acts.

THE RESTRICTIVE MAXIMS:

(6) Equity Aids the Vigilant, not Those Who Slumber on Their Rights

This principle applies where a person has delayed asserting a claim against another person until the circumstances have changed or the latter has acted so as to be prejudicially affected by the delay. In such a case equity will hold the claimant guilty of laches and deny him relief. Where there is no applicable "statute of limitations," that is a statute limiting the period within which a claim may be asserted or sued upon after it has arisen, the effect of a delay by a plaintiff in commencing suit is determined in equity, not by a definite rule specifying the time within which such suit must be brought, but by the principle that a proceeding must be instituted within a time which is reasonable under all of the circumstances, the most determinative factor being the prejudice that may result to the defendant because of the delay. Consequently the period expiring from the time a

[14] McClintock, p. 31.

right to sue originates until the time when suit is brought and the effect of such period upon the right of the plaintiff to sue, will vary with the facts of different cases. However, where an equitable claim has not been asserted within a period equal to that limited by a statute applicable to common-law actions, the delay will generally be held to constitute laches, whether or not the adverse party has been prejudiced thereby.[15]

(7) He Who Comes into Equity Must Come with Clean Hands

This maxim means that a plaintiff who has been guilty of inequitable conduct in the same matter concerning which he asks relief against inequitable conduct of the defendant will be denied remedy. No person can obtain affirmative, equitable relief in regard to a transaction in which he has himself been guilty of inequitable conduct. Thus, a plaintiff seeking relief from a fraud committed by defendant must not have committed any inequity in the same affair, or equity will not aid him.

(8) He Who Seeks Equity Must do Equity

Consequently, a person seeking the affirmative aid of an equity court may be required as a condition of his obtaining equitable relief to do such acts as chancery deems just and therefore required with respect to the matter although otherwise he could not be compelled to perform such acts. Plaintiff coming into equity must not only have "clean hands," or be free from inequitable conduct, but he must also do all that equity may consider on his part as right and fair in the transaction.[16]

15 "The original statute of limitations did not apply to suits in equity. But in cases where the chancellors were asked to give equitable protection to a legal right, they adopted the practice of holding that a delay in the assertion of the right which would bar an action at law thereon under the statute of limitations would ordinarily amount to laches which precluded relief in equity. The effect of the practice was that, in cases where the delay was less than that which would bar an action at law, the defendant must show that it was unreasonable under the circumstances; delay of a longer period would bar relief, unless plaintiff could affirmatively show that it was reasonable. Later statutes of limitations apply to suits in equity as well as to actions at law. While equity courts cannot disregard these statutes by entertaining a suit after the term fixed by the statute has expired, they still may find a delay less than the time fixed by the statute to be unreasonable and prejudicial, and therefore to preclude recovery." McClintock, pp. 40, 41.

16 "The most common class of cases where the maxim is applied is where the plaintiff seeks to recover property, quiet title thereto, or cancel an instrument, and it appears that he has received in connection with the transaction some benefit which will result in his unjust enrichment if he is permitted to obtain the relief while retaining the benefit. Thus one who seeks to cancel an outstanding tax deed will be compelled to repay the amount of the tax lien which was discharged by the tax sale; in a suit to quiet title against one who has been in possession in good faith under color of title, or because of mistake, plaintiff may be compelled to reimburse the latter for the value of permanent improvements placed upon the premises or taxes paid thereon; one who seeks to cancel an instrument for fraud or illegality may be compelled to repay the consideration he has received, with legal interest. But plaintiff cannot be compelled to reimburse the defendant for expenditures he has made unless they have resulted in a benefit to plaintiff." McClintock, pp. 31, 32.

(9) Where There are Equal Equities, the Law will Prevail

Therefore, if two or more persons to a controversy in chancery have equitable rights in the subject-matter of equal merit and one of them has the legal right thereto, the chancellor will refuse to grant relief against the holder of such legal right in favor of the others. The result, then, is the same as if the proceeding had been brought at law in which event the legal right would prevail.

(10) Where There are Equal Equities, the First in Time Will Prevail

Thus, if two or more persons to a controversy in chancery have equitable rights in the subject-matter which are of equal merit, except as to time of origin, and none of the parties has the legal right thereto, equity will not give relief against the holder of the oldest claim in favor of the others. The result is that the oldest right prevails.

(11) Equity Follows the Law

This maxim results from the historical fact that equity developed because of inadequacies of the common-law structure and as a supplement thereto; it was not intended to supersede the older system. Therefore, as chancery would give complete relief upon taking jurisdiction of a controversy, it necessarily applied common-law rules where it could consistently do so, hence the maxim. However, "the maxim that equity follows the law is disregarded much more frequently than it is applied; necessarily so, since equity is a system for the correction of the defects in the law. When equity is giving specific relief for the protection of legal rights, it generally will follow the law in determining what those rights are. In determining the rights of parties claiming equitable interests in property, equity will often

follow the analogy of common-law estates, but, if it considers it to be equitable to depart from that analogy, it will do so."[17]

Summary

As the maxims are contradictory and not absolute or peremptory, they may be confusing unless it is remembered that they are the products of the equity system in operation, used by its judges largely as guides, and that they are not the causes of that system. The maxims are the proverbs of equity, generalizations formulated by chancery decisions, and because they are such, like most if not all generalities, they are not completely true. However, they may be useful if properly understood, and "it may be true that he who has fully comprehended the meaning attached to these maxims by courts of equity has an insight into the essentials of equity jurisprudence."[18]

EQUITY IN THE COLONIES AND THE UNITED STATES

28. The equity system of England was generally adopted in the original English colonies in America and in the later States as a part of their law, but the administration thereof by a court separate from the common-law courts was not so generally adopted.

Included in the law which the English colonists carried to America was the equity system developed in England by the chancellors, but in many of the colonies opposition to the king resulted in opposition to the chancellor as a royal appointee, and in most of them there was a conflict for control of the administration of equity between the popular legislatures and the royal or proprietary governors. "Where the governors prevailed, they exercised the power themselves, or appointed chancellors to do so. Where the legislature prevailed, the administration of the system was vested in local courts, often the same courts as were already exercising jurisdiction in common-law cases."[19] When the Government of the United States was established the Constitution[20] provided that, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Therefore, the jurisdiction of the

[17] McClintock, p. 30.

[18] McClintock, p. 31, citing 1 Pomeroy, Eq. Jur. § 363.

[19] McClintock, pp. 6, 7.

[20] Art. 3, § 2, U.S.C.A.Const.

federal courts was made to include suits in equity as well as actions at law, but the two systems have always been administered by the same courts and judges, rather than by separate tribunals as was the case in England. However, "the provision of the first judiciary act [1 Stat. 73] and of its successors, that procedure in the federal courts should conform, as nearly as might be, to that of the courts of the state in which they sat, never applied to procedure in equity;"[21] and until September 16, 1938, when the Federal Rules of Civil Procedure went into effect, equity was administered by the federal courts in the various states as a uniform system governed only by the precedents of the English chancery court, except as modified by equity rules promulgated from time to time by the United States Supreme Court, whereas the procedure for actions at law in the federal courts varied according to the procedure for such actions obtaining in the courts of the various states.

THE FUSION OF LAW AND EQUITY

29. Legislation adopted in England, the United States, and a majority of the States, has combined the formerly separate common-law and equity procedural rules and methods into single systems administered by the same systems of courts.

In General

Originally, actions at law and suits in equity were governed by distinct systems of procedural rules, that is, there was a distinct procedure for each, but during the nineteenth century movements arose in England and the states against such complexity and legislative simplification resulted. However, the extent to which the formerly separate systems of procedure have been unified varies in different jurisdictions.

The English Judicature Acts of 1873 and 1875, which went into effect in 1875, united all the principal tribunals into one Supreme Court of Judicature, and provided that, in each division of such court, law and equity should be administered concurrently under a single, simplified code of procedure, and that, in case of conflict between rules of equity and common-law rules applicable to the same matter, the rules of equity should prevail.

In 1934, Congress passed an enactment[22] which authorized the United States Supreme Court to unite the rules governing

[21] McClintock, p. 7.

[22] Act of June 19, 1934, c. 651, §§ 1, 2, 48 Stat. 1064, 28 U.S.C.A. §§ 723b, 723c.

suits in equity and actions at law in the federal courts; and pursuant to this statute "the Court has united the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."[23] These regulations, entitled the "Federal Rules of Civil Procedure,"[24] became effective September 16, 1938, and superseded all prior laws in conflict with them. "These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity."[25] Rule 2 provides that, "There shall be one form of action to be known as 'civil action.'" However, "these rules do not apply to proceedings in admiralty,"[26] so the forms and modes of proceeding in suits of admiralty and maritime jurisdiction are still governed by a separate system of rules promulgated under another statute.[27]

Procedural regulations differ in the several states, but most of them have adopted legislation abolishing the formal distinctions between suits in equity and actions at law, and "the tendency of the present age is strongly toward the obliteration of the separation between common-law and equity jurisdiction."[28]

[23] From a letter by Mr. Charles E. Hughes, Chief Justice of the United States, with which the Federal Rules of Civil Procedure adopted by the Supreme Court were transmitted to the Attorney General, who, under the Act of June 19, 1934, had the duty of reporting the rules to the Congress.

[24] Rule 85, 28 U.S.C.A. following section 723c.

[25] Rule 1, 28 U.S.C.A. following section 723c.

[26] Rule 81(a) (1), 28 U.S.C.A. following section 723c.

[27] See R.S. § 913, 28 U.S.C.A. § 723.

[28] Bowman, p. 281.

"Codes or practice acts purporting to abolish the formal distinctions between actions at law and suits in equity were adopted in the following states in the years indicated: Arizona, 1864; California, 1850; Colorado, 1877; Connecticut, 1879; Illinois, 1933; Indiana, 1852; Idaho, 1864; Kansas, 1859; Minnesota, 1851; Missouri, 1849; Montana, 1865; Nebraska, 1855; Nevada, 1860; New Mexico, 1897; New York, 1848; North Carolina, 1868; North Dakota, 1862; Ohio, 1853; Oklahoma, 1890; South Carolina, 1870; South Dakota, 1862; Utah, 1870; Washington, 1854; Wisconsin, 1856; and Wyoming, 1869; and in the Territories of Alaska, 1900, and Puerto Rico, 1904. In Alabama, Arkansas, Delaware, Mississippi, New Jersey, Tennessee, and Vermont separate courts of equity are still maintained. In the other states the formal distinction between law and equity suits is maintained to a greater or less extent, but the two systems are administered by the same courts, as is the case in the federal judiciary system." McClintock, pp. 7, 8, note.

CHAPTER 6

ENACTED LAW

IN GENERAL

30. The enacted law of a state is that part of its positive law which has been formulated by legislation, as distinguished from adjudication, except that it includes such judicial decisions as constitute authoritative interpretations of legislation.[1]

Nature

Legislative power is "lawmaking" power and therefore a part of the ultimate, sovereign power in a state. As such, it is manifested in one of the United States whenever the people thereof amend their constitution or ordain a new one. However, the most numerous illustrations of enacted law in the States and the United States are the statutes enacted by the legislative departments of the governments. Because the legislative power in the States and the United States may be authoritatively exercised in more ways than one, the enacted laws thereof subdivide into the following classes: (1) federal and state constitutions; (2) federal and state statutes, or acts; (3) federal treaties; (4) executive orders and proclamations of the President and of the State Governors, as authorized by statutes; (5) administrative regulations of heads of departments, boards, and commissions, when authorized by statutes; (6) ordinances of the subdivisions of the States, such as cities and villages; and, (7) rules of courts regulating the manner of conducting proceedings before them.

[1] The term "statutory law" is sometimes used in referring to the enacted law of a state, but in the strict sense a statute is "a particular law enacted and established by the will of the legislative department of government," [Black's Law Dictionary, 3d. Ed., p. 1655], and does not include such enactments as written constitutions or treaties. The term "written law" has also been used as synonymous of enacted law, but is rarely used so in modern practice, the term "legislation" being preferred, or the specific term "constitution," "statute," or "ordinance," as the case may be.

History and Development

The formulation of laws by enactment through the agency of a representative, distinct, and relatively independent legislative department of government such as the legislatures of the several States and the Congress of the United States, has been brought about as the result of gradual developments in England which evolved the English Parliament.[2] "The English Parliament is the model of parliamentary government throughout the world. When the American state and federal constitutions were established, the English model was controlling to a considerable extent. The theory of separation of powers as set forth by the famous *Esprit des Lois* of Montesquieu was accepted, but it departed so far from the English model that the executive—corresponding roughly to the Ministry—had no seats in Congress or the Legislature and took no part in the debates of these bodies. Otherwise, the general example of the English system was followed. Whether a power is legislative or administrative or judicial is determined, not by logical categories, but by the historic fact of whether it was a power possessed by the English Parliament. If it was so possessed, it is also possessed by American legislatures, unless it has been specifically taken away by the Constitution. In this way, the rights to summon persons to give information, to punish for contempt, to grant divorces, have been declared to be powers of the legislatures, even though not expressly granted. And some of these implied powers have been claimed even for the federal Congress, despite the constitutional declaration that Congress has only specifically granted powers. While the upper house of the federal Congress, the Senate, has a basis of representation quite different from that of the lower, the difference between the upper and the lower houses of most states is usually a difference of rank. The Senate is smaller, and membership in it confers a slightly greater prestige, although, in fact, the Senate has very little legislative power that is not possessed by the lower house, generally called the Assembly. The ghost of

[2] Concerning this development, Radin has said: "We are, most of us, at the present day, so accustomed to the theory that governmental power is of three types, executive, legislative and judicial, that we find it hard to think ourselves into a situation when this division was not commonly used because it was unknown. Further, of the three powers, the legislative, although it is officially called merely co-ordinate, is in popular contemplation, so definitely the most important that its activity is thought of as preeminently creating our law. In ancient societies legislation is not thought of as a function of government.

"Our notion of the legislative functions, again, cannot readily detach itself from the kind of legislative machinery which we possess ourselves and which most countries in the world, except a few recently created dictatorships, have adopted. It is of English origin. Its characteristic is that it consists of two separately organized bodies, usually equal in power, but not in dignity. In addition, there is a single executive who has usually only a suspensive veto, but who frequently has the right of submitting proposals or advising the carrying out of certain specific or general policies. What the two legislative bodies, meeting separately and acting successively, agree upon, is a statute, a 'law,' binding on the entire citizenry. And the 'laws' so 'passed,' numbering many hundreds or even thousands, are peremptory commands to the courts.

"All this would be quite unintelligible to the men who laid the foundations of our legal system and who developed it into modern times. Our theory of statute law did not begin to take shape until the overthrow of the Stuarts and the establishment of Parliamentary supremacy. The English Constitution of the eighteenth century, idealized and wrongly analyzed in Montesquieu's Spirit of Laws, became the symbol of enlightened freedom and gathered within itself a great deal of the impulsive force of the doctrine of Natural Law. The breach with medieval ideas was really made then and not till then. An Act of Parliament was then for the first time fully and unquestionably what its name implies, a determination made by a body organized specifically to make such determinations, and ending all controversy on whatever subject-matter could by reasonable intendment be covered by the words of the act. * * *

"The effect of statutes on the development of English law is one that is highly characteristic. The first statutes being specifically royal commands, often as limited in time as in persons affected, did not seem to create law, as we understand it. That is to say, the accepted notion was not that there was a great body of established law to which each statute *pro tanto* brought some modification, whether by addition or subtraction. It was in the first place doubtful whether a statute by itself did not expire with the king who had issued it. The documents in which the king speaks for himself and his successors are usually charters of liberties which were assumed to have existed before the king's reign and might therefore well survive it. Kings would repeat the 'good statutes' of their predecessors, and that fact may have rendered it easy to assume that a royal enactment lasted indefinitely and would be enforced, or, better, that it was tacitly reaffirmed by subsequent kings.

"But the Common Law was the creation of the king's courts. They had men brought before them by writs, and the King's Chancery, which served, supplemented and later corrected the king's courts, would issue writs to all the king's liegemen for a fee. It was by no means a matter of course that every statute would justify a writ [on a right claimed under a statute]. * * * But it soon became the case that statutes had this force. In the fourteenth century, it was taken for granted that, if there was a statute, one needed neither a precedent in the Chancery nor a closely resembling writ. If the statute was presented, a writ citing its words and basing itself on that alone was quite enough. The clerks must issue it, as they must issue any writ *de cursu*. Otherwise they denied justice, and an account would be demanded of them.

"Statutes thus become a source of law in the English system, because

the Feudal *Magna Curia* seems to be chiefly responsible for the distinction."[3]

United States

The enacted law of the United States embraces: (1) the Constitution of the United States; (2) acts of Congress; (3) treaties of the United States; (4) executive orders and proclamations of the President; (5) administrative regulations of heads of departments, boards, and commissions; (6) acts of territorial legislatures, local to each particular territory; (7) judicial interpretations of the foregoing by federal and State courts subject to final determination by the Supreme Court of the United States; and, (8) the rules of practice in the federal courts.

States

The enacted law of a state embraces: (1) its constitution; (2) the acts of its legislature; (3) executive orders and proclamations promulgated by its governor; (4) administrative regulations of state boards and commissions; (5) ordinances of its subdivisions such as cities and villages, local to each particular subdivision; (6) judicial interpretations of the foregoing by state and federal courts; and, (7) the rules of practice of the state courts.

Legislative Procedure

A federal or state statute, to be valid, must be enacted in conformity with pertinent constitutional provisions; but it is not necessary that parliamentary rules of procedure nor the analogous rules of the enacting house be strictly followed.[4] During its formative stages in the legislative process a proposed enactment is called a "bill," and it does not become a "statute" or law until it has successfully progressed through the various steps of the

they are admitted by the courts as a means of initiating court action." Radin on Anglo-American Legal History, pp. 327, 328, 333, 334.

3 Radin on Anglo-American Legal History, pp. 63, 64.

4 In respect to procedural matters not regulated by constitutional provisions, legislatures are subject only to such rules as they may prescribe for themselves or choose to recognize. However, parliamentary rules of procedure in general use are ordinarily followed, except as to matters regarded by a particular legislature as requiring special rules. As a legislature has the authority to change its rules of procedure whenever it may so desire, a statute enacted by it in conformity with pertinent constitutional provisions will be sustained by the courts although the procedural rules of the legislative body may not have been observed in the passage of the act.

legislative process. These steps usually include: (1) introduction; (2) reference to a committee; (3) readings; (4) vote; (5) signing by the presiding officer; (6) presentation to the other house wherein the foregoing procedure is repeated; (7) submission to, and approval or disapproval by, the executive; and, (8) reconsideration by the legislature in case of veto by the executive.

Ordinarily any member has a right to introduce a bill to his house, and the usual practice is to refer the bill to a committee after its introduction. The committee then considers it and refers it back, with reports favorable or otherwise, for consideration by the house. In several of the states this course is made obligatory by the constitution. "As a general rule, bills of any kind may originate in either house of a state legislature, and may be amended, accepted, or rejected by the other. The principal exception to this rule is in the case of measures for raising revenue, which, by the constitutions of most of the states, are required to be first introduced in the lower or more numerous branch of the legislature.[5] But such a constitutional provision applies only to bills to levy taxes, in the strict sense of the word, and not to bills for other purposes which may incidentally raise revenue. The constitutions of many of the states require that a bill, before it shall become a law, shall be read a certain number of times (usually two or three) in each house. In respect to the manner of such reading, the provision is considered merely directory; but not so with regard to the fact of its being read. If the constitution is not obeyed in this particular, the statute is void."[6] The sovereign intendment behind such provisions is the procurement of due deliberation at this stage of the enactment proceeding.

To become a law a bill must be approved by a vote of the necessary majority of both houses of the legislature. "In some special cases a majority of two-thirds or even three-fourths is prescribed. But ordinarily a simple majority is enough. If the con-

5 (The Constitution of the United States, art. 1, § 7, cl. 1, U.S.C.A. also requires that, "All Bills for raising Revenue shall originate in the House of Representatives.")

6 Black, p. 357. "In a considerable number of the states, the constitution provides that the three readings of a bill may be dispended with in case of 'urgency' by a vote of two-thirds or three-fourths of the members of the house where the measure is pending. When such an occasion arises, it is for the house alone to determine whether there is such 'urgency' as to justify the passage of the bill without reading or with less than the usual number of readings. This is a question which will not be inquired into by the courts." Black, p. 358.

stitution provides for a vote by a majority 'of the members' or 'of the whole representation,' this is imperative. But if the requirement is simply that there shall be a majority, it is understood that a majority of those present and voting (provided they constitute a quorum) will be sufficient. But whatever the constitutional requirement may be, it is absolutely necessary that the bill should receive the concurrent votes of a sufficient number of the members of each house to enact it into a law. If this is not the case, it never becomes a statute of the state, and the courts are not bound to regard or obey it. Moreover, the same act must be passed by both houses in the same identical form, and in that form it must be submitted to the governor in order to become a law."[7] Having been duly passed by the requisite majorities of the legislature, engrossed, and attested by the presiding officers of the legislative houses, a bill is submitted to the executive for his approval or veto. If approved by the executive, the bill becomes a law; if vetoed, a bill does not become a law unless it is enacted over the disapproval of the executive by the legislative majority required in such cases, but "such passage makes it ipso facto a law."[8]

CLASSIFICATION OF STATUTES

31. Statutes divide into different classes, according to their form, the time of the acts on which they operate, the persons whom they affect, the territory within their force, their object, their effect as to acts in compliance or not in compliance with them, their relation to prior statutes, and their relation to the decisional or common law.

Form

As to their form, statutes are either affirmative or negative. A statute is affirmative in form when expressed in affirmative terms; negative, when expressed in negative terms.

[7] Black, pp. 358, 359.

[8] Black, p. 314.

A statute of complete form usually contains the following parts: (1) A title, briefly indicating its nature; (2) A preamble, beginning with "Whereas," and indicating the reasons for the statute, and possibly its general effect; (3) The purview, or body of the statute, generally beginning with "Be it enacted." To various other parts or clauses of a statute descriptive terms are also commonly attached by lawyers. Thus, the clause beginning with "Be it enacted," and ending with "that," is termed the enacting clause; a passage explaining the meaning of words or terms used is called an interpretation clause; and, passages beginning "Except," or "Provided," or "Nothing in this act shall," are termed, respectively, exceptions, provisos, and saving clauses.

Time

As to the time of the acts on which they operate, statutes are either prospective or retrospective. A prospective statute is one which applies only to acts which are performed after its enactment. A retrospective statute is one which applies to acts performed prior to its enactment. "If a retrospective statute is in the nature of an ex post facto law or a bill of attainder, or if it impairs the obligation of contracts or divests vested rights, or if all retrospective laws are specifically forbidden by the constitution of the particular state, such an act will be unconstitutional and void, but not otherwise."[9]

Persons Affected

As to the persons whom they affect, statutes are either public or private. A public statute is one which applies to persons in general. A private statute is one which applies only to particular persons. For example, a law providing pensions for all persons conforming to certain conditions is public; whereas an act granting a pension to a particular person is private. Generally, public statutes are included in codifications but private statutes are not, and the former may be judicially noticed, or noticed without proof of them by courts; whereas private enactments must be proved in court unless judicial notice of them is required by statute.[10]

Territory

As to the territory within their force, statutes are either general or local. A general statute is one that applies to the entire territory over which the legislature which enacts it has authority. A local statute is one applicable only to a limited portion of the territory over which the legislature that enacts it has authority. The classification of general and local statutes is sometimes confused with the classification of public and private statutes, but their bases are different, the former involving a distinction of persons; the latter, a distinction of place.

Object

As to their object, statutes are either remedial or penal. "Remedial statutes are those which are enacted to afford a rem-

[9] Black on Interpretation of Laws, 2d. Ed., § 115, p. 382.

The Constitution of the United States provides, (Art. 1, § 9, cl. 3), "No Bill of Attainder or ex post facto Law shall be passed;" and, (Art. 1, § 10, cl. 1), "No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."

[10] See McKelvey on Evidence, 4th. Ed., p. 30.

edy, or facilitate an existing remedy, or to correct defects, mistakes, and omissions. Penal statutes are those by which punishments are imposed for transgressions of the law, civil as well as criminal."[11]

Effect

As to their effect on acts of persons which are in compliance or not in compliance with them, and as to their effect when persons omit to do such acts as are within their scope, statutes are either preceptive, prohibitive, permissive, or directory. A statute is preceptive or mandatory "when it commands and requires that certain action shall be taken by those to whom the statute is addressed, without leaving them any choice or discretion in the matter, or when, in respect to action taken under the statute, there must be exact and literal compliance with its terms, or else the act done will be absolutely void."[12] Failure to do an act required by a preceptive or mandatory statute, which act is one of a series, may render ineffectual a result sought to be obtained. For example, failure of persons organizing a corporation to do an act required by a mandatory provision of the applicable law may prevent their association from becoming a de jure, as distinguished from a de facto, corporation, although they may have complied with various other mandatory requirements. A prohibitive statute is one which forbids certain acts, rendering such acts unlawful when committed and subjecting the persons guilty thereof to the prescribed penalties. A statute "which authorizes or permits certain action to be taken by those to whom it is addressed or whom it concerns, at their option or in their discretion, but does not imperatively require it, is said to be enabling or permissive."[13] A statute "which directs the manner in which certain action shall be taken or certain official duties performed is said to be directory when its nature and terms are such that disregard of it, or want of literal compliance with it, though constituting an irregularity, will not absolutely vitiate the proceedings taken under it."[14]

Relation to Prior Statutes

In its relation to existing acts a statute may be either amendatory, declaratory, or original. A statute is amendatory when

[11] How to Find the Law, 2d. Ed., p. 181.

[12] Black on Interpretation of Laws, 2d. Ed., § 147, p. 525.

[13] Black on Interpretation of Laws, 2d. Ed., § 148, p. 525.

[14] Black on Interpretation of Laws, 2d. Ed., § 149, p. 525.

it alters, amends, or supplements an existing act. A statute is declaratory or expository in its relation to an existing act when its purpose is to interpret or construe, clarify or define, the meaning of an existing act. A statute which is neither amendatory nor declaratory of an existing act is an original statute.

Relation to Common Law

Common law may be affirmed or declared, supplemented, or superseded by statutes. A statute is declaratory in its relation to the common law when it merely affirms principles already existing therein. On the other hand an act which is supplementary to the common law "does not displace that law any further than is clearly necessary. The statute is in general considered as merely cumulative, unless the rights or remedies which it creates are expressly made exclusive."[15] However, "the common law gives way to a statute which is inconsistent with it; and when a statute is designed as a revision, consolidation, or codification of the whole body of the law applicable to a given subject, it supersedes the common law so far as it applies to that subject, and leaves no part of it in force."[16] Court-made principles develop and are altered gradually and slowly, but by legislation old law may be changed or new law created almost instantaneously; thus, "legislation tends, with advancing civilization, to become the nearly exclusive source of new law."[17]

[15] Black on Interpretation of Laws, 2d. Ed., § 111, p. 363.

[16] Black on Interpretation of Laws, 2d. Ed., § 112, p. 365.

[17] Holland, Jurisprudence, p. 65.

CHAPTER 7

THE RANK AND INTERPRETATION OF LAWS

LAW AS SUPREME

32. The principle of "equality before the law" is a characteristic of Anglo-American jurisprudence, and governmental officials as well as private persons are usually subject to the same general legal precepts administered by the ordinary courts of justice; but the legal precepts so administered are of different rank.

Law in medieval England was thought of as "something antecedent and paramount to the state. Hence despite the despotic character of the kingly power then and later, abstract theories of an absolute and limitless sovereignty have never had the place in English constitutional theory which they early obtained and long held in other countries."[1] As Bracton wrote, (about 1250), "The king rules under God and the Law."[2] Such philosophy constituted at least a part of the background of the conflict between the Stuart kings and the courts in the early seventeenth century, coming to realization in the Revolution of 1688; and, "while the political tenet still remains true that 'the king can do no wrong,' his 'responsible' ministers, who conduct the actual operations of government in his name, are for the most part subject, like unofficial persons, to the ordinary law of the land. In most countries the conduct of public officers is judged in accordance with a special administrative law administered by special administrative courts. In England, and consequently in the United States, such officers are for the most part answerable to the ordinary law administered by the ordinary courts; [and the conception of law as supreme] has made English political development and English political theory, and in consequence the political development and theory of the United States, different from those of most of the world. It has also exalted the judicial office and the power of the courts—the law is supreme, and the judges

[1] Bowman, pp. 203, 204.

[2] *De Legibus*, f. 5b.

are its custodians and interpreters. Wherever English law has gone throughout the world, the courts of last resort have always a peculiarly powerful and predominant authority in its enunciation."[3]

Consistent with this tradition, the jural law of the United States and the municipal law of the several States are supreme within their spheres, and all persons are ordinarily amenable to them; but, by reason of the constitutional theories and the federal and state governments obtaining in the United States, the various laws of the different governments are of unequal rank and where two rules conflict the higher in rank prevails.

LAWS AND THEIR RANK

33. Laws in the United States rank in authority as follows:

(a) The Constitution of the United States,

(b) The Statutes and Treaties of the United States,

(c) The Constitution of the State,

(d) The Statutes of the State,

(e) The Local Ordinances, and

(f) The Common Law.

The Constitution of the United States, as previously shown, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[4] Consequently, if a provision of the federal constitution is applicable to a controversy pending before a court, no other law need be looked to as the constitution is supreme and governs where pertinent; but as the precepts recited in the federal constitution are relatively few in number and general in character, the rule determinative of litigation is more often of different authority. Next to the federal constitution in degree of force are the statutes and treaties of the United States. These are of co-ordinate rank, a later treaty superseding a prior, inconsistent statute; a later statute superseding a prior, inconsistent treaty.

[3] Bowman, p. 204.

[4] Art. 6, U.S.C.A. Const.

The constitutions, statutes, and ordinances of the several states and their subdivisions are inferior in rank to the federal constitution and the valid statutes and treaties of the United States, and no law of a particular state has any force if it is inconsistent with the constitution or valid statutes and treaties of the United States. However, most of the cases presented to the courts of a state involve only the law of the particular state and within its sphere the constitution of the state is the supreme law. Next in authority are the constitutional statutes of the state, and below the statutes are the regulations of the state's subdivisions such as the ordinances of cities and villages. No such ordinance is valid if it conflicts with either a statute or the constitution of the state.

In cases of conflict between common-law principles and enacted precepts, the latter prevail.

Executive Regulations

By reason of the functional division of governmental power in the United States and the constitutional grants thereof to separate departments, the general principle is that Congress or the legislature of a state cannot transfer the legislative powers vested in them to the judicial or the executive departments; but although a legislative body cannot delegate its power to make laws, "yet, having enacted statutes, it may invest executive officers or boards or commissions created for the purpose with authority to make rules and regulations for the practical administration of such statutes in matters of detail and to enforce the same, and also to determine the existence of the facts or conditions on which the application of the law depends."[5]

[5] Black, § 76, p. 108.

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress." Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214, 32 S.Ct. 436, 441, 56 L.Ed. 729, 1912.

Thus, "as to all of the following, the constitutionality of their creation and of the grants of powers to them has been sustained: The Interstate Commerce Commission, with control over all the railroads of the country doing an interstate business; the Federal Trade Commission, designed to stop unfair methods of competition in business; the Federal Reserve Board, unifying the banking system of the country and with a measure of control over the national banks; * * * various forms of industrial commissions in the several states, administering workmen's compensation laws; boards and commissions authorized to fix minimum wages and maximum hours of labor for women and children in industry; state and national civil service commissions, prescribing rules for the appointment and removal of public officers; railroad boards, public service commissions or public utilities commissions, with control over the various forms of public service corporations, the service they render, and the rates they may charge; state and local boards of health; commissions to regulate the sale to the public of stocks and bonds and enforce the 'blue sky' laws; boards of censors for moving pictures; and boards of examiners or commissioners having control over the licensing of persons desiring to practice as physicians, dentists, pharmacists, engineers, architects, or to engage in any one of a large number of occupations." Black, pp. 110, 111.

However, the President of the United States has authority to promulgate proclamations "either on his own initiative or as authorized or directed by the Constitution or an act of Congress. While they have not the force of law, they are, in the latter case, of binding effect. In English law, a proclamation is 'a notice publicly given of anything whereof the king thinks fit to advertise his subjects.' In American law, it is a formal and official public notice, issued by the chief executive in his own name, intended for the notice of all persons who may be concerned, announcing some statute or treaty, or some public act or determination, or intended action, of the executive department, which otherwise might not be so widely or so quickly promulgated. The making of proclamations is not an assumption of legislative powers. * * * The authority of the President to issue proclamations is sometimes derived from acts of Congress specifically empowering him to do so in relation to a particular matter, and in other cases appears to be derived from his duty to take care that the laws be faithfully executed."[6]

The President also has authority to issue executive orders and his subordinates have authority to promulgate rules for the regulation of the internal affairs and procedure of the executive department and its subdivisions; but the rules and orders promulgated by the President or by the heads of the departments under his authority relating to the conduct of public business or to the civil service or other administrative matters "have not the force of law and are not statutes in any sense; and although they are effective for the internal control and government of the executive departments, courts of equity have no jurisdiction or authority to enforce them."[7]

[6] Black, pp. 140, 141.

[7] Black, p. 141.

Principles analogous to those pertinent to federal executive promulgations apply in general to the similar regulations issued by state executive officers, boards, and commissions. Hence the power to make, amend, and repeal laws allowed the legislatures of the states by their constitutions cannot be delegated by them to other bodies or persons; but when the legislature of a state enacts a general law complete in itself "it may confer on public officers or administrative boards or commissions the authority to make rules and regulations for carrying the law into effect, and there is no unlawful delegation of legislative power though the administrators of the law must deal in a quasi legislative way with matters which are in a certain aspect legislative, though predominantly administrative in their nature. But no person's rights or property can be subjected to the arbitrary control of any officer or board, and a statute which delegates unlimited power to a public official, to be exercised by him in his discretion and without restraint from any rules or laws, is invalid."[8]

Court Rules

Courts have inherent power to make proper regulations for the administration of their business and rules to govern the procedure of trials, but the legislative power, subject to constitutional restrictions, includes authority to establish the procedure by which courts shall exercise their jurisdiction and where a positive rule of practice is declared by statute the courts have no discretion in the matter. Generally, however, courts are authorized by statute to make such regulations as are necessary.

The inherent power of the judiciary to regulate its administrative and procedural affairs is not absolute but is subject to constitutional and statutory limitations. In other words, court rules are inferior in rank to statutes and constitutional provisions, thus, where a court rule conflicts with a statute or constitutional provision the court rule must yield and the superior constitutional or statutory provision prevails.[9]

[8] Black, p. 354.

[9] "Only such matters as are not regulated by general or special laws in reference to practice and procedure may be regulated by a rule of court. Among matters which, subject to this principle and to the rules as to reasonableness and conformity to constitutional and statutory provisions, are proper for regulation by rule of court may be mentioned process; the issuance of attachments; notices of appearance; calendars; calling of the dockets; the publication of legal notices; the necessity of pleadings; the form of pleadings, or briefs, or of stipulations or agreements; presenting or filing complaints, pleadings and other papers; affidavits of merits or defense; notice of counterclaims; the manner of making issues; defaults; the effect of failure to deny averments in pleadings; motions to require security for costs; notice of motions; time for application for change of venue; recognizances for appearance by persons accused of crime and seeking a change of venue; continuances; the granting or refusing of leave to discontinue; making objections in writing; admissibility and reception of evidence; submission of civil causes on abstracts of record; time of trial; trial by jury; time for presenting special instructions and interrogatories to the jury; requests for written findings of fact separate from conclusions of law; arguments of counsel; exceptions to auditors' reports; the time for filing exceptions; affidavits to accompany exceptions to an account; applications for rehearing; errors to be considered on motion for a new trial; entry of judgment; stays of execution; the examination of debtors in supplementary proceedings; records to be kept by the clerk; practice with respect to appeals; the time within which cases shall be noted for settlement; the form and time of filing transcripts on appeal; fees and costs; and generally, all matters of practice and procedure." 15 C.J. § 278, pp. 904–907.

RULES FOR CONSTRUCTION OF STATUTES

34. Rules for the construction of statutes consist of regulatory and directory principles which have been developed by the judiciary and which are used by the courts as standards for interpreting enactments and determining the legislative intention in statutes.

In General

The function of the judiciary is that of resolving conflicts between legal interests by the application of the rule pertinent to the particular factual situation involved, and to properly perform this function a court must determine what the relevant precept is and ascertain its meaning, hence the necessity for constructive presumptions and rules of interpretation.[10]

Presumptions

In construing or interpreting doubtful and ambiguous statutes the judiciary concedes certain appropriate presumptions which it has formulated to legally favor the intention of the legislature. Included among such presumptions are the following: (a) that

[10] "Some authors have attempted to introduce a distinction between 'interpretation' and 'construction.' Etymologically there is, perhaps, such a distinction; but it has not been accepted by the profession. For practical purposes any such distinction may be ignored, in view of the real object of both interpretation and construction, which is merely to ascertain the meaning and will of the lawmaking body, in order that it may be enforced." How to Find the Law, 2d Ed., § 5, p. 182.

the legislature does not design any attempt to transcend the rightful limits of its authority; (b) that every act of the legislature is valid and constitutional, unless the contrary is shown; (c) that the lawmaking body intended to be consistent and just, and not to require an impossibility, or to work public inconvenience or private hardship; (d) that the legislature intended its enactments to accord with the principles of sound public policy and the interests of public morality; and, (e) that the legislature intended to impart to its enactments such meaning as would render them operative and effective.[11] However, such presumptions cannot prevail against clear, explicit terms in a statute and if the intention of the legislature is not doubtful the courts must take the act as it reads regardless of the consequences.

Rules of Construction

The rules of construction are not rules of positive law except where they have been enacted into statutes. "They rest on the authority of the courts, which have gradually evolved them, and they are not imperatively binding in the same sense as are the enactments of the legislature. The true object of all interpretation is to ascertain the meaning and will of the law-making body, to the end that it may be enforced. It is not permissible, under the pretence of interpretation, to make a law, different from that which the law-making body intended to enact."[12] Consequently, when a court is confronted with a problem of statutory construction, the meaning that the legislature intended to convey by the act must be sought first in the language of the statute itself. And, "if the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the legislature intended to convey. In other words, the statute must be interpreted literally. Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it. If the language of the statute is ambiguous, or lacks precision, or is fairly susceptible of two or more interpretations, the intended meaning of it must be sought by the aid of all pertinent and admissible considerations. But here, as before, the object of the search is the meaning and intention of the legislature, and the court is not at liberty, merely because it has a choice between two constructions, to substitute for the will of the legislature its own ideas as to the justice, expediency, or policy of the law."[13]

[11] How to Find the Law, 2d Ed., p. 183.

[12] Black on Interpretation of Laws, 2d Ed., §§ 3, 4, pp. 9, 11.

Among the principal rules used in the construction of written documents generally, which are also observed by the judiciary for the purpose of ascertaining legislative intention where such intention is not clear, and as expressed for the latter purpose, are the following: (1) The words of a statute are to be construed with reference to its subject-matter. If they are susceptible of several meanings, that one is to be adopted which best accords with the subject to which the statute relates. (2) The words of a statute are to be taken in their ordinary and popular meaning, unless they are technical terms or words of art, in which case they are to be understood in their technical sense. (3) Words that have changed in meaning since the framing of the instrument are to be construed as they were understood at the time the document was drawn. (4) Words are to be construed in connection with the context, and the entire statute is to be read as one complete instrument. (5) Primarily, a statute is to be interpreted according to the ordinary meaning of its words and the proper grammatical effect of their arrangement in the act. But if there is any ambiguity, or if there is room for more than one interpretation, the rules of grammar will be disregarded, where a too-strict adherence to them would raise a repugnance or absurdity or would defeat the purpose of the legislation. (6) As an aid to the sense of an enactment, its punctuation may be referred to. (7) Clerical errors or misprints, which, if uncorrected, would leave the statute without meaning, render it nonsensical, or defeat or impair its intended operation, should not vitiate the act. (8) The words of a statute are to be so construed as to carry out the general purposes of the statute. To this end, the title and the preamble may be used. But the title of a statute cannot control or vary the meaning of the enacting part of the statute if the latter is plain and unambiguous. (9) If a doubt or uncertainty as to the meaning of the legislature cannot be removed by a consideration of the act itself and its various parts, recourse may be had to extraneous facts, circumstances, and means of explanation; but those only are admissible which are logically connected with the act in question, or authentic, or inherently entitled to respectful consideration.

[13] Black on Interpretation of Laws, 2d Ed., pp. 45, 46.

Among the principal rules of construction particularly applicable to statutes are the following: (1) The words of a statute are to be construed, if possible, so as to prevent it from being declared invalid for unconstitutionality or repugnancy. (2) Statutes in pari materia (or on the same subject), are to be construed together. Each legislative act is to be interpreted with reference to other acts relating to the same matter or subject. (3) Generally, the words of a statute are to be construed in the light of the pre-existing law. (4) Penal statutes are to be construed strictly;[14] remedial statutes are to be construed liberally.[15] (5) "When the interpretation of a statute according to the exact and literal import of its words would lead to absurd or mischievous consequences, or would thwart or contravene the manifest purpose of the legislature in its enactment, it should be construed according to its spirit and reason, disregarding or modifying, so far as may be necessary, the strict letter of the law. In accordance with this principle the courts have power to declare that a case which falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the legislature. Conversely, statutes may be extended to cases not within the literal import of their terms, if plainly meant to be included; for that which is within the intention of the legislature, in the framing of a statute, is as much within the statute as if it were within its letter. But where the statute is free from ambiguity and plainly shows what the legislature meant, the letter of it is not to be disregarded under the pretext of pursuing its spirit, and exceptions not made by the legislature cannot be read into it."[16]

[14] "Strict construction of a statute is that which refuses to expand the law by implications or equitable considerations, but confines its operations to cases which are clearly within the letter of the statute, as well as within its spirit or reason, not so as to defeat the manifest purpose of the legislature, but so as to resolve all reasonable doubts against the applicability of the statute to the particular case." How to Find the Law, 2d Ed., p. 188.

[15] Liberal construction "expands the meaning of the statute to embrace cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such an interpretation is not inconsistent with the language used. It resolves all reasonable doubts in favor of the applicability of the statute to the particular case." How to Find the Law, 2d Ed., p. 188.

[16] Black on Interpretation of Laws, 2d Ed., pp. 66, 67.

Amendments

An original act and a subsequent enactment amendatory of it are to be read and construed as one statute. The theory behind the rule is that the original act and its amendment constitute but one law. Hence, the rule is that an amended statute should be interpreted as if it had read originally as it does amended; but "an amendatory statute, like other legislative acts, takes effect only from its passage, and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied."[17]

THE AUTHORITY AND INTERPRETATION OF JUDICIAL DECISIONS

35. The judgment of a court affects the persons and their legal interests involved in the particular litigation to which it applies under the doctrine of res judicata; it affects other persons generally and their legal interests under the doctrine of stare decisis.

In General

"A judgment, as to all matters decided thereby, and as to all matters necessarily involved in the litigation leading thereto, binds and estops all parties thereto and their privies in all cases where the same matters are again brought in question. Such is the doctrine of res judicata. There is also the doctrine of stare decisis, which is of a different nature. When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, and this it does for the stability and certainty of the law."[18]

The doctrines of res judicata and stare decisis differ in three main particulars. First, they differ as to the parties affected, as under the former a judgment (unless it be in rem) is deemed conclusive only upon the parties to the particular case it determines and those who are in privity with them, but under the doctrine of stare decisis a judgment as a precedent will be applied by courts to cases involving different parties, it being only necessary that their legal rights and relations be substantially similar to those resolved in the precedent case. Second, the two doc-

[17] Black on Interpretation of Laws, 2d Ed., p. 584.

[18] Moore v. City of Albany, 98 N. Y. 396, 1885.

trines are different in the nature of the questions settled under them. The doctrine of res judicata "applies to controverted questions of fact, and prevents the re-examination of issues of fact once judicially settled in a court of competent jurisdiction. The rule of stare decisis has no relation to matters of fact, but is applicable when disputed questions of law have been officially settled and determined."[19] Third, although both of these doctrines are directed to the same general objective, that of putting an end to litigation, they differ in the methods by which they operate to accomplish this purpose. Under the doctrine of res judicata a judgment is deemed to be conclusive as to the case it determines in order that the parties may not continue or renew their conflict indefinitely. "The object is to put a definite end to each individual controversy when a final judgment has been reached, so that it may not be indefinitely protracted in the courts. The doctrine of stare decisis, on the other hand, seeks to prevent litigation in general by rendering it unnecessary. Its object is to impart such certainty and stability to the law that every man may be certified of the nature and extent of his various rights and legal relations, and may be enabled to govern his conduct in such a manner as to make it unnecessary for him to come before the courts either as a plaintiff or a defendant."[20]

[19] Black's Law of Judicial Precedents, pp. 192, 193.

[20] Black's Law of Judicial Precedents, p. 194.

To be distinguished from the doctrines of stare decisis and res judicata is the doctrine of the law of the case. "When a point or question arising in the course of a litigation is once solemnly and finally decided, the rule or principle of law announced as applicable to the facts presented becomes the law of that case in all its subsequent stages or developments, and is binding both upon the parties and their privies and also upon the court, so that the former will not be permitted, nor will the latter consent, to reopen the same issues for further consideration whatever grounds there may be for regarding that decision as erroneous." (Black's Law of Judicial Precedents, p. 262.) In other words, when a judgment has been rendered in a cause, it is to be regarded as the final declaration of the law applicable to the issues involved, subject, of course, to appeal or review, and in the absence of a successful appeal therefrom, if the cause goes to a further stage, all subsequent rulings will be made with reference to the judgment rendered and nothing inconsistent with it can be alleged by the parties or held by the court. For example, where a judgment of a trial court has been appealed to an appellate court, and the latter has reversed the judgment and ordered a new trial in the lower court, upon a second appeal from the new trial the appellate court will not reconsider a question which it adjudicated on the former appeal, such adjudication having become a law of the case. Thus, regarded as a precedent, a decision may be overruled or modified, but when regarded as the law of the case it cannot be departed from; and, whereas the doctrine of res judicata has regard to subsequent, independent suits, the doctrine of the law of the case has regard to subsequent stages of the same suit.

[21] Black's Law of Judicial Precedents, p. 2.

Precedents

A judicial precedent "is an adjudged case or decision of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case afterwards arising, between the same or other parties, in the same or another court, on a similar question of law."[21] Judicial precedents are available through various printed reports, and the decisions of the highest courts of the States and the decisions of the Supreme Court of the United States are published officially. A complete report of a case usually contains: (a) the title, or names of the parties to the suit; (b) the syllabus or headnote, in which the reporter indicates the points decided; (c) a statement of the facts out of which the controversy arose; (d) a synopsis of the arguments or briefs of the counsel; (e) the opinion, or reasons given by the court for the decision; (f) the decision, or determination of the rights of the parties; and, (g) the judgment, or formal order entered as a result of the decision.

It is the decision of the case, not the reasons or arguments of the court for its decision, which makes the precedent. The opinion may explain and justify the decision but the opinion has no authority beyond the point or points actually determined. However, "it is not alone the concrete decision in the particular case which measures its scope as a precedent, but the legal reason for the decision, the 'ratio decidendi,' that is, the underlying rule or principle of law which, applied to the facts, caused the particular judgment to be given. A decision is authority for rules or principles of law tacitly assumed by the court as a basis for its consideration and determination of the specific questions involved, provided they are so essentially involved in the decision that the particular judgment could not logically have been given without their recognition and application; but not as to propositions underlying the decision which were assumed by the court without examination simply because they were conceded or assumed by the parties or counsel. Where several questions are presented by the record and are considered and deliberately decided by the court, all of which lead up to the final conclusion and have influence in determining the judgment to be given, all are embraced within the authority of the case as a precedent. A decision is

not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given."[22]

Interpretation of Precedents

The report of a case, that is the language of a judicial opinion, "is always to be construed with reference to the circumstances of the particular case and the question actually under consideration; and the authority of the decision, as a precedent, is limited to those points of law which are raised by the record, considered by the court, and necessary to the determination of the case."[23] The decision of a prior case is a precedent for the decision of a subsequent case if the facts of the two are substantially the same and are without material difference. It is not necessary that the facts of the two cases be absolutely identical. However, if there is a material difference in their facts the earlier case is not determinative of the later one, and there is a "material difference" if the first case contained facts or circumstances essentially a part of the issue and directly influencing the judgment which are not present in the second case, or if the second case contains facts or circumstances likewise essential to be considered in its determination which were not present in the first case but which if present would have modified or changed the judgment therein.

In the construction of a decision for the purpose of ascertaining its force as a precedent the principles used by the court as determinative of the case must be distinguished from any superfluous language or dicta, in its opinion a dictum being "an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court. It may either be put forth as the personal opinion of the judge who delivers the judgment of the court, or introduced by way of illustration, argument, or analogy, but not bearing directly upon the question at issue, or it may be a statement of legal principles over and above what is necessary to the decision of the controverted questions in the case. * * * Dicta pronounced in a judicial opinion may be entitled to respect, on account of the learning or general accuracy of the judge from whom they proceed; but as they are not the

[22] Black's Law of Judicial Precedents, p. 37.

[23] Black's Law of Judicial Precedents, p. 49.

judicial determinations of the court, they are never entitled to the force and effect of precedents, in the same or other courts, and do not preclude the rendering of a subsequent contrary decision."[24]

Authority of Precedents

The separate judicial systems of the federal and state governments include courts of different jurisdiction or rank, and the relative authority and force of their decisions as precedents vary accordingly. Thus, (excluding various special courts), at the bottom of the federal judicial system are the district courts; next above them are the circuit courts of appeals; and at the top is the Supreme Court of the United States.

The decisions of the United States Supreme Court are binding upon all the circuit courts of appeals and all the district courts; and the decisions of a circuit court of appeals are binding upon the district courts within the same circuit. But a district court in one circuit is not bound to follow a precedent established by the circuit court of appeals in another circuit although such a precedent is considered as very persuasive by the district courts in other circuits, and a court of one rank is not bound to follow a decision of another court of the same rank. Conversely, the decisions of the district courts are not binding upon the circuit courts of appeals or the Supreme Court, nor are the decisions of the circuit courts of appeals binding upon the Supreme Court.

As the inferior federal courts are bound to follow the precedents of the United States Supreme Court, so the courts of the states are bound to follow its decisions in cases involving federal questions, such questions being those which arise under the Constitution, statutes, and treaties of the United States. And, where the decisions of the highest court of a state and those of the United States Supreme Court are in conflict on a federal question, it is the duty of an inferior court of the state to follow the precedents of the federal tribunal in a case involving such question.

The precedents in the decisions of state courts of different rank also vary in force according to the authority of the tribunals establishing them. Thus, the decisions of the highest court of a state are binding upon the intermediate appellate courts and the trial courts of the state, and the decisions of the intermediate appellate courts are binding upon the trial courts below them with-

[24] Black's Law of Judicial Precedents, §§ 54, 57, pp. 166, 176.

in their respective districts; but the decision of any inferior court is not binding upon another court of the same rank although it may be followed for the sake of uniformity, nor is the decision of an inferior state court binding upon any state court of higher rank with appellate jurisdiction over it.

As there is no federal, general common law, and as the decisions of the highest court of a state are conclusive in regard to the meaning of state statutes and their validity under the state constitution, the precedents established by the highest court of a state are binding upon the federal courts in all cases originating in the state, except as to questions arising under the Constitution, statutes, or treaties of the United States.

The Constitution of the United States[25] provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," and although the construction of this clause involves a federal question so that its interpretation by the Supreme Court of the United States is controlling, "it is now finally and firmly settled that a judgment rendered by a court of competent authority, having jurisdiction of the parties and the subject-matter, in one state, is conclusive on the merits in the courts of every other state, when made the basis of an action, and in such action the merits cannot be inquired into."[26] However, this provision does not require "that judgments in one state shall be followed by the courts of other states as matter of authority in other similar cases. The constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one state to follow those of another upon any question, whether upon the construction of local statutes or otherwise. * * * The duty of the courts of one state to follow those of another, upon questions arising upon the construction of statutes of the latter, is a duty resting alone upon comity, and not one imposed by the federal constitution."[27] Consequently, the judgment of a court of one state is effective under the doctrine of res judicata in the courts of other states as to the points decided in a case of which it had jurisdiction; but it is not binding under the stare decisis doctrine upon the courts of other states in their decisions of other cases.[28] The decisions of a court of one state applying common-law principles or construing local statutes may be persuasive authority to the courts of other states in cases involving analogous problems and enactments, but they are not binding precedents.

[25] Art. 4, § 1, U.S.C.A.Const.

[26] Black, p. 284.

[27] Wiggins Ferry Co. v. Chicago & A. R. Co., C.C., 11 F. 381, 1882.

[28] See 34 C.J. § 1602(1), pp. 1125–1127.

Hence, it is only the highest court in the judicial system, national or state, that has ultimate authority to establish precedents binding within the legal province of its government; therefore only such court possesses power to overrule the precedents it establishes, and as the purpose of the stare decisis doctrine is to give certainty to common law so that persons may act upon it with confidence a court will not overrule its prior decisions except for very cogent reasons.[29]

Precedents in Construction of Statutes

A settled interpretation of a statute by the judiciary has practically the same authority as the statute itself, therefore the rea-

[29] "The following are reasons which are properly influential in inducing a court to overrule one of its former decisions: (a) That it was an isolated decision, which has not been followed or acquiesced in, and is now deemed erroneous. (b) That the decision was rendered by a divided court, concerned a matter of great importance, and is now seriously doubted. (c) That it has been received with general dissatisfaction and submitted to under protest and severely criticised and that its authority is questionable. (d) That it is contrary to plain and obvious principles of law, provided it has not become a rule of property or been followed in numerous subsequent cases. (e) That it was an innovation and is contrary to the rule of law on the same subject which is of practically universal acceptance in all other jurisdictions. (f) That the rights or interests of the state or its municipalities, or of the general public, are injuriously affected by the decision in question, but no private rights depend upon its maintenance, and it is erroneous. (g) That the decision was wrong and produces general inconvenience or injustice, and that, although some private rights may be injured by overruling it, yet less harm will result from that course than from allowing the decision to stand. But the fact that the application of a well-settled rule of law will work hardship in the particular case before the court is not reason for overruling the prior decisions or departing from them.

"The following are reasons which should influence a court against overruling a former decision, notwithstanding the fact that it is now deemed erroneous or open to grave question: (a) That it has stood unchallenged for a long period of years. (b) That it has been approved and followed in many subsequent decisions of the same or other courts. (c) That it has been universally accepted and acted upon and acquiesced in by courts, the legal profession, and the public generally. (d) That it has become a rule of property. (e) That contracts have been made, business transacted, and rights adjusted in reliance upon it, for such a length of time, or to such an extent, that more harm would result from overruling it than from allowing the original error to stand uncorrected." Black's Law of Judicial Precedents, pp. 203, 204.

sons which induce courts to adhere to precedents apply to judicial constructions of enacted laws as well as to common-law decisions. However, a court can overrule its construction of statutes as it can overrule its common-law precedents, but the power will not be exercised except for very urgent reasons, and "where rights of property have accrued and contracts have been made in reliance upon the judicial construction of a statute, and were valid at the time of their inception under such construction, a subsequent decision overruling prior decisions and reversing the construction established thereby will not be allowed to retroact so as to destroy those rights or invalidate those contracts."[30]

The force of a judicial construction of a statute depends upon the nature of the question determined by the interpretation and whether the statute and court are federal or state. Thus, the construction of federal statutes by the Supreme Court of the United States and its interpretation of state statutes on federal questions are binding upon all courts, national or state. On the other hand, where no federal question is involved, the construction of a statute of a state by its highest court is binding upon the inferior courts of that state and will be followed by all other courts, including those of the United States and those of other states.

Judge-made Law as Enacted Law

"The case law that is produced by way of judicial interpretation of the enacted law, though decisional in its form, is merely the enacted law as authoritatively determined by the courts. It is therefore to be considered as part of the enacted law, and classed therewith, rather than as part of the law which has its origin solely in judicial decisions."[31]

30 Black on Interpretation of Laws, 2d Ed., pp. 618, 619.

31 Bowman, p. 211.

CHAPTER 8

PERSONS AND RIGHTS

THE FUNCTION OF MUNICIPAL LAW

36. In its function municipal law recognizes, defines and secures various individual, state and social interests.

In General

"A legal system attains its end by recognizing certain interests,—individual, public, and social,—by defining the limits within which these interests shall be recognized legally and given effect through the force of the state, and by endeavoring to secure the interests so recognized within the defined limits. It does not create these interests. There is so much truth in the old theories of natural rights. Undoubtedly the progress of society and the development of government increase the demands which individuals may make, and so increase the number and variety of these interests. But they arise, apart from the law, through the competition of individuals with each other, the competition of groups or societies with each other, and the competition of individuals with such groups or societies. The law does not create them, it only recognizes them. Yet it does not have for its sole function to recognize interests which exist independently. It must determine which it will recognize, it must define the extent to which it will give effect to them in view of other interests,—individual, public, or social,—and the possibilities of effective interference by law, and it must devise means by which they are to be secured."[1]

1 Pound, Interests of Personality, 28 Harv. Law Rev. 343, 1915.

INTERESTS

37. Interests include the individual and collective desires and claims of human beings and are necessarily recognized, defined and secured by law for the attainment of order in society. They are of three classes:

(a) Interests of individuals,

(b) Interests of the state, and

(c) Interests of society.

Interests of Individuals

The interests of individuals subdivide into the following classes: (1) the interest in personality, or integrity of the person; (2) interests in property, its physical integrity, use, and enjoyment; and, (3) interests in relations with others, such as family, social, political, professional, and trade relations.[2]

Interests of the State

A state, considered as a juristic person, legal entity, or unit, has interests in its existence, property, and its relations with other states, corporations, and natural persons. Considered as the political agency of the society it serves, the interests of a state are in the performance of its functions as the diplomat, legislator, jurist, and political executive of the community; in its protection of individual and social interests.

Interests of Society

Social (or societal) interests are the interests of a community considered as a group of individuals apart from the state and

[2] This classification of interests is that of Dean Leon Green's of Northwestern University. In commenting upon it Dean Green has written, "Dean Pound and others have considered the *interest of personality* as multiple, normally (1) the physical person, (2) honor, reputation, and (3) belief and opinion. [Selected Essays on the Law of Torts, p. 86; 28 Harvard Law Review 343, 345, note, 1924.] In this classification, personality is conceived to be a unity. It is readily conceded that 'the person' is something more than the mere body; he is a going concern with blood and bones, nerves, intellect, spirit, life itself. This being so, it is felt that the 'integrity of the person' comprehends the whole being. It is true that this 'person' demands honor, reputation, and has opinions and beliefs. But these call for the introduction of third persons into the picture. It is thus felt that honor and reputation can most significantly be identified with the *interests in relations with others*." Green, Judge and Jury, p. 5.

are based on the general progress of the group and the welfare of its individuals as members of the group. Such societal interests include the interests of the community in the general security, the public health, morals, and peace; the interests of the community in the security of social institutions, the familial, religious, economic, and political establishments; and the interests of the community in the natural resources.

The legal system of a society is a tool of that society, a political philosophy and agency the purpose of which is to maintain social order and the precepts which it contains and applies in resolving conflicts between various interests are based not only on what is deemed just as to the individuals who may be involved, but also as to what will best serve the broader interests of the society. A society is made up of individuals and when the latter are considered as members of the former, what serves the interests of one serves the interests of the other. "Social interests are, therefore, the most fundamental of all interests, the common denominator, so to speak, to which, from the standpoint of law and government, all other interests are ultimately reducible."[3]

LEGAL RIGHTS

38. A legal right is that which entitles a person or group to legal protection of an interest recognized by law, or which entitles a person or group to legal relief when infringement of a legally recognized interest is threatened or committed contrary to law.

Classes, Elements, and Correlatives of Legal Rights

Legal rights, according to their nature, are classified as claims, powers, privileges, and immunities; and are either public or private, in personam or in rem, primary or remedial.[4]

The elements of a legal right are: (1) its subject, or the person who owns or is entitled to it; (2) its correlative, or the condition it imposes upon the persons bound by it, and such persons; (3) its content, or the act which the person or persons

[3] Bowman, pp. 79, 80.

[4] The term "legal right" is ambiguous in that it is used in reference to claims, powers, privileges, and immunities and also to distinguish the "legal" rights which were recognized by the courts of common law from "equitable" rights, or the rights which were recognized only by the Chancery Court, before the fusion of law and equity. When found, the meaning in which the term "legal right" is used must be ascertained from the context.

bound must do or not do; (4) its object, or the thing to which the content or act relates, and which is the concern of the interest protected by the right; (5) its title, or the facts which created the right or vested it in its subject or owner.

The various types of legal rights, or claims, powers, privileges, and immunities, differ in the kinds of authority they confer upon their subjects or owners, and also in their correlatives or the kinds of conditions they impose upon the persons they bind. Thus, generally, against a claim owned by one person or group there is a correlative duty imposed upon another person or group; against a power, a liability; against a privilege, an inability; against an immunity, a disability. The bond between the persons involved by a legal right and its respective correlative constitutes what is called a "jural relation," and hence there are the claim-duty, power-liability, privilege-inability, and immunity-disability kinds of jural relations.

Public and Private Rights

Legal rights are either public or private. Public legal rights are rights of or against the state. Private legal rights are rights of private persons against private persons. This classification relates to the division of law into public and private categories discussed in a subsequent chapter.[5]

JURAL RELATIONS

Claims—Duties

A legal claim is a right of one person against another that the latter shall or shall not do a certain act. For example, a creditor has a "claim" against his debtor for the debt which the latter owes him and correlatively the debtor has the duty of paying the claim when the debt becomes due. If the debtor violates his duty and does not make timely payment the creditor can obtain legal redress against him.

Powers—Liabilities

A legal power is the ability or authority which a person may have to create, alter, or extinguish a jural relation by doing or not doing a certain act. For example, an agent may have the "power" or authority to execute a contract for his principal with a third person. Correlatively, when the agent acting within his

[5] See c. 10, § 49, infra.

authority has executed such a contract, his principal is liable for its performance. If the principal does not fulfill his promises in the contract the other party thereto may obtain legal redress against him.

Privileges—Inabilities

A legal privilege is an exemption from a duty because of special circumstances without which there would be a duty. For example, a traveler on a public highway which is temporarily obstructed is legally "privileged" to pass the obstruction by going onto the adjoining, private land. The special circumstances create the privilege which exempts the traveler from the duty he would otherwise have of not entering the adjoining land and the owner of the land is precluded from recovering from the traveler for his act which, but for the privilege, would be an actionable trespass. The traveler is thus accorded an exemption and the landowner made to suffer an "inability" by reason of the privilege.

Immunities—Disabilities

A legal immunity is an exemption from liability because of special circumstances without which there would be a liability. For example, a witness in a judicial proceeding has an "immunity" from punishment by the court for refusing to testify against himself. Ordinarily, proper questions put to a witness must be answered by him or he can be punished for contempt of court, but questions which could subject the witness to criminal prosecution are excepted from the rule. Hence, a witness has the privilege of refusing to answer such questions and is legally "immune" from punishment therefor. Correlatively, by reason of the immunity in such case, the judge is "disabled" from adjudging the witness in contempt of court.

Rights in Personam and Rights in Rem

Legal rights, as to the persons against whom they operate, are classified as (a) personal rights or rights in personam, or (b) as real rights or rights in rem. Rights in personam are those which operate against a definite person or a definite group of persons and only the latter, rather than persons generally, are subject to the correlative duties, liabilities, inabilities, and disabilities. For example, the claim of a landlord against his tenant for rent, his power and privilege to dispossess the tenant in case of nonpayment, and his immunity from liability for dis-

possessing the tenant in such case, constitute rights in personam and only the tenant is subject to the correlative impositions. The rights of persons in similarly definite relations, which rights are operative only against the other parties to the relations, are likewise in personam. Thus, whenever two persons enter into a contract with each other the rights each has to its performance by the other are rights in personam. Because they arise generally from individual interests in definite, personal relations, which interests have been legally recognized, rights in personam are often referred to as "rights of obligations," and the correlatives of rights in personam are called "obligations."

On the other hand, real rights or rights in rem are such as operate universally, against persons in general, consequently every person is subject to the impositions correlative to the rights in rem of all other persons. For example, by reason of the legal recognition of the individual interest in personality, a person has a right to the physical integrity of his body and hence is entitled to redress at law against any other person who infringes such interest and violates such right by committing an assault or a battery upon him. Similarly, by reason of the legal recognition of the individual interest in property, a person has a right to the physical integrity of the land and chattels that he owns and is entitled to redress at law against all other persons who infringe such interest. Because of the "real" nature of the relations from which they arise, as distinguished from the personal relations characteristic of rights in personam, rights in rem are also designated as "real rights." However, the individual interests in some "personal relations" are given such legal recognition that they are secured by rights in rem against persons generally. For example, if A and B enter into a contract, each has a right in personam against the other to performance of the contract by the other; but, in addition, both may have rights in rem protecting their interests in their relation against the acts of third persons in general so that if C should induce either A or B to breach their contract, the other would have a cause of action against C. Suppose C induced B to breach the contract. The act of C may be considered as in violation of a right in rem of A, whereas the breach of the contract by B would constitute a violation of a right in personam of A. The distinction is that the right in personam a person has by reason of his interest in a personal relation is against only the other person or persons to the relation, but a right in rem that he may have because of such a relational interest is against persons other than those who are also parties to the relation.

Primary and Remedial Rights

Legal rights are classified according to their functions as primary or remedial. Primary rights are rights which originate with legal recognition of the interests which they protect and which, in their function, secure such interests independently of any acts done in relation thereto considered as contrary to law. Primary rights are created simply by reason of legal recognition of the interests with which they are associated and exist because of such recognition. Thus, the real and personal rights which a person has as a direct consequence of legal recognition of the individual interests in personality, property, and relations are all "primary." For example, the right in rem of a person not to be assaulted, resulting from legal recognition of the individual interest in personality, is primary; the right in rem of a person not to have his chattels converted, resulting from legal recognition of the individual interests in property, is primary; and the rights in personam and real rights that a person may have by reason of legal recognition of the individual relational interests, are primary rights.

Remedial rights, on the other hand, are rights which originate when interests protected by primary rights are threatened or violated and which, in their function, entitle the persons whose primary rights are so threatened or violated to obtain legal redress. For example, when the primary right of a person not to be assaulted is violated, he obtains a remedial right which entitles him to redress at law against the wrongdoer; when the primary right of a person not to have his chattels converted is violated, he obtains a remedial right which entitles him to legal redress against the wrongdoer; and when the primary rights which a person has by reason of his relations with others are violated, he obtains remedial rights to legal redress against the wrongdoers. These are all examples of remedial rights in personam, being against definite persons, and most other remedial rights are in personam. However, remedial rights may operate in rem. For example, the rights of a person to determine title to real property, foreclose liens upon real or personal property, or to alter his status by divorce operate in rem because they operate for the person realizing them against all other persons generally.

Therefore, a primary right is one which arises upon legal recognition of an interest, exists independently of an infringement of the interest, and is violated when the interest is infringed; whereas a remedial right arises only when an interest protected

by a primary right is threatened or infringed and entitles the subject or owner of the primary right to the appropriate legal relief. The former protects, the latter remedies.

PERSONS

39. Persons, in law, are entities having capacity to own or be bound by legal rights.

In General

The capacity to be the subject or owner of a legal right is the ability to control or influence the acts of others with the aid of the state, whereas the capacity to be bound by legal rights is the ability to act so as to subject oneself to the correlative conditions imposed by the legal rights of others. Any entity capable of having legal rights and acting so as to assume legal duties or incur legal liabilities has the status of a legal person, and possesses legal personality.

Natural and Juristic Persons

Legal personality is conferred by the law upon two classes of persons, natural and juristic. The former is composed of human beings; the latter, of the state, municipalities, and private corporations. And, although the legal personality of a juristic person may be limited in certain particulars by reason of the nature of such a person, to the extent that it is conferred the legal personality of a juristic person is as effective as that of a natural person. On the other hand, not all natural persons have complete legal personalities and may thus be distinguished by their "normal" and "abnormal" legal personalities. For example, a natural person may be said to have a "normal" legal personality when he has the capacity to enforce rights in court, assume legal duties, and incur civil and criminal liabilities; whereas such a person has an "abnormal" legal personality when he does not have all of these capacities. Such abnormality, or an incapacity precluding a natural person from having complete legal personality, may be the consequence of any of the following conditions: (1) infancy; (2) marriage; (3) alienage; (4) mental infirmity; or, (5) conviction of crime.

Except for rights to inherit property accorded an unborn child but which do not become effective until the child is born alive, and except for what protection may be given an unborn child by statutes making abortions criminal, it may be said that the legal

personality of a natural person begins with his birth; and except for those causes of action which are allowed by the law to survive, it may be said that the legal personality of a natural person ends with his death.

ACTS

40. Acts, which compose the contents of legal rights, are external manifestations of the wills of persons.

"The essential elements of an act are: (1) an exertion of the will; (2) a manifestation of the will. Since the will can manifest itself only through the body, the act comprises a willed bodily motion, or a willed abstention from bodily motion, and nothing further. It does not include any of its results nor the motive or state of mind which induces it. But, for the purpose of determining liability, the law holds the doer of the act accountable for the result, and takes into consideration the circumstances in which the act was done and the state of mind which induced or accompanied it."[6]

Unless, then, a movement or failure to move is willed, it is not an "act." For example, if A, an epileptic, while having a fit, falls against and injures B, A is not liable to B, as the movements of A were not willed and therefore were not "acts." Again, if A pushes B against C and the latter is injured, A, not B, is liable to C, as it was A, not B, who "acted."

Whether or not the commission of a legal act subjects the actor to an action at law, a suit in equity, or a criminal prosecution depends on whether the act was contrary to some principle of law. In other words, an act must infringe some legally recognized and protected individual, state, or societal interest in order to render the actor legally liable, or to constitute a "legal wrong." When an act of a person has rendered him legally liable, his motive and state of mind which induced and accompanied the act, as well as the surrounding circumstances, are factors which the law may consider for the purpose of determining the extent of his liability.

Kinds of Acts

Legal acts are either positive or negative, intentional or unintentional. A positive act is one of commission; a negative act, one of forbearance or omission. A person fulfilling a duty either

[6] Bowman, p. 105.

does what he ought to do (commission-positive), or abstains from doing what he ought not to do (forbearance-negative); whereas a person violating a duty either does what he ought not to do (commission-positive), or omits to do what he ought to do (omission-negative).

An intentional act is one the external result of which was desired by the actor, either as an end in itself or as a means to an end. An unintentional act is one the result of which was not desired by the actor. "In both cases the act may be positive or negative. If a person by a willed activity causes harm to another purposely, as by beating him, his act is positive and intentional. If he by a willed activity causes harm through inadvertence or forgetfulness, as by driving against a person carelessly, his act is positive and unintentional. Both are acts of commission. If a person withholds payment of his note on the day it is due, remembering it and resolving not to pay it, his act is negative and intended; that is to say, an act of intentional omission. If he fails to pay his note through forgetfulness, his act is negative and unintended; that is to say, an act of unintentional omission."[7]

OBJECTS OR THINGS

41. The object of a legal right is the thing which is the concern of the interest protected by the right.

Every legal right is a right in or to a thing, that is to say, every legal right has an object, but such object or thing may be tangible or intangible, corporeal or incorporeal, and it may or may not have economic value. Thus, the liberty, health, and life of a person are "things," as are his legally protected relations with others, and his land and chattels. Each may be the object of a legal right.

FACTS

42. Facts, in law, are either operative or evidential.

"An operative fact is an act or event which affects jural relations. An evidential fact is an act, event, or static condition, or some combination of them from which the existence of some other fact, operative or evidential, may logically be inferred."[8]

[7] Bowman, p. 108.

[8] Bowman, § 53, p. 110.

CHAPTER 9

PROPERTY

IN GENERAL

43. The objects of legal rights are either things which have economic value or things which do not have economic value. Property rights are legal rights in or to things which have economic value.

The term "property" is commonly used to denote the things which are the objects of legal rights, but in its strict legal sense the term property denotes legal rights in or to things rather than the things themselves, and only rights in things which have economic value as distinguished from things without economic value.[1] The life, health, and liberty of a person are objects of legal rights but they are not objects of legal property rights because they do not have economic value. Only things of economic value such as lands, buildings, bonds and patents constitute the objects of legal property rights.

In Anglo-American law property rights are divided into two classes designated as "real property" and "personal property," generally distinguishable by the movability of the things in which they inhere. This natural division was given legal significance by the feudal system with the consequence that real and personal property are governed by different rules.

THE FEUDAL SYSTEM

44. Feudalism was an intricate combination of social, political and economic relationships many of which were based upon the landholding method characteristic of the system.

In General

The fundamental social unit of the feudal system was the relationship of a lord to his vassal or man. "There were reciprocal

[1] As the term "property" is used to denote both legal rights in things of economic value and the objects of such rights, the precise sense in which the term is used must be ascertained from the context.

duties. The lord owed the man protection which often required an active effort to defend him personally and to secure his rights. The vassal owed his lord fealty, which required his active service on his lord's behalf. The general terms 'protection' and 'fealty' received a specific content either by the engagement which the vassal took when the relationship was created, or by custom, which soon created a number of minor services, partly substantial and partly honorific."[2] Under the method of landholding that was a chief characteristic of the feudal system, lands were held by "tenure," either directly under the king, the "lord paramount," or indirectly through "mesne" or intermediate lords. "The lord, of course, could be the vassal of another lord, a situation that implied a definite hierarchy. In its most developed form, the longest series would probably contain four degrees, the supreme lord, generally (1) the king or emperor; (2) the great magnate, who was a duke, an earl or count, a marquess (margrave), an archbishop, or a bishop; (3) the baron; and (4) the freeman, who might or might not be a knight. The intermediate degrees were often absent. There were at all times freemen who had no direct superior except the supreme lord himself, the king or emperor."[3] Inferior to the freemen were the serfs and slaves who composed the laboring class.[4]

Feudalism in England

A rudimentary feudalism which had existed in England before the Norman Conquest, was greatly deepened and strengthened by William the Conqueror. "By right of conquest he succeeded to all the lands owned by the Saxon king. Other large blocks of land came to him through the confiscation of estates of the

[2] Radin on Anglo-American Legal History, p. 120.

[3] Radin on Anglo-American Legal History, p. 121.

[4] "The difference between slavery and serfdom was that the slave was a chattel wholly without legal rights, personal or property, who could be transferred at will from one master to another. The serf was personally free. To kill him was homicide. To injure him was a wrongful act. He could acquire for himself property in movable goods. What he lacked was the freedom of migration from place to place, and the power of disposing of all his labor. For part of every week, his labor belonged to his master—the term is not too strong—as far as agricultural labor was concerned. He must plow, sow and reap his master's land. Again he could not freely contract even as to his own property. He must use his master's mill to grind his grain. As far as selling his surplus, if he had any, was concerned, that was usually restricted by custom and by lack of market facility." Radin on Anglo-American Legal History, pp. 121, 122.

higher English landowning class who opposed him at the Conquest or who later rebelled against him. Keeping some of these lands as his personal manors, William parceled out great tracts among his leading men and favorites as his tenants, on mutual promises of protection on his part and fealty and support on theirs, and on condition that they would aid him in war or render other service for the land received. These men, in turn, retaining some of their portion for themselves, parceled out the greater part among their immediate followers on similar terms; and this process was repeated on a diminishing scale. Many of the English soon after came forward, surrendered their lands to William or a lord, and received them back as tenants."[5] Thus, the feudalistic method of landholding was culminated in England with the king at the apex, his "tenants-in-chief" under him, their inferiors under them, and so on through the several inferior ranks to the freemen who occupied the lands and the serfs who worked them.

Feudalistic Legal Theory

In feudalistic legal theory the king was the original owner of all the land and accordingly the Conquest was regarded as having vested in William the Conqueror title to all the land in England. Hence, practically every landholder in England except the king was a tenant, and every tenant, whether noble or not, held his land by the rendition of services deemed appropriate to his station and upon the condition that his holding would be forfeited if he failed to perform them.

Tenures

"Tenure" was the name for the personal relationship which the feudal system of landholding required implying that land was held but not owned. It signified the holding of lands in subordination to some superior, and also the terms of the holding. It was both a term of property and one describing social position. The king was the original owner of the land and merely permitted other men to use lands on specific conditions. Their "tenures" could be subject to termination by limitations in their grants, forfeiture, failure of issue, renunciation, or surrender.

Tenures had two formal, indispensable incidents, homage and fealty, each requiring a different oath. Homage served the purpose of establishing the personal relation which was the funda-

[5] Bowman, p. 146.

mental basis of feudalism, and without which no status within the feudal system could be acquired, whereas fealty created the obligation to perform the services, substantial or formal, which constituted for the lord part of the direct profit he expected to derive from the tenancy and a breach of which justified forfeiture of the estate of the tenant. According to the duration of the tenancy and the nature of the services by which the tenant held it, tenures were either free or unfree. Freehold tenants held heritably or for life, and in return rendered services considered appropriate for freemen. Unfree (or villein) tenants held according to the custom of the manor by the service of common labor.

The principal free tenures were of the three following classes: (1) Military, called tenure by *knight's service,* by which most of the lords held lands; (2) Agricultural, called tenure in *free and common socage,* by which free farmers held land; and, (3) Ecclesiastical, called tenure in *frank almoign* (free alms), by which clerical persons or bodies held lands. Unfree tenures, on the other hand, were of many kinds and grades, being determined by the local customs of the manor. These varied from manor to manor and differed considerably in different parts of early England and consequently were called, in a special sense, "customary" tenures. However, "gradually the burdens of unfree or villein tenure became ameliorated through special agreements with the lords, conceding to villein tenants rights almost indistinguishable from those of freehold tenants, and as evidence that such agreements had been made they were set forth on the rolls (records) of the lord's court. In this way there arose a distinct class of specially privileged villein tenants, called 'copyholders'; they held by copy of the rolls of the lord's court. The rules which grew up with respect to the rights of copyholders were purely local to the manor. They were determined in case of dispute by the lord's court and formed no part of the common law during the early centuries of its development."[6]

Conveyances Under the Feudal System; Subinfeudation

During the time of the feudal system in England, "a tenant who held lands in fee simple could alienate all his lands, and his grantee would thus become tenant to the original lord, in place of the grantor. By alienating, however, a part (not the whole) of his lands, he could make the alienee his own tenant; that is,

[6] Bowman, p. 151.

the grantor, since he could not require his lord to accept a diversion of the service due him, still remained the tenant of the original (or superior) lord, although the grantor became the lord (mesne, or intermediate lord) of the person to whom he had granted a part of his lands. The tenant thus created could do the same thing, as likewise, in turn, each successive tenant. This gave rise to a series of sub-feuds; the process being known as subinfeudation. The result was that the feudal rights of the superior lord were diminished. He lost his rights of escheat, marriage, and wardship in the land thus alienated. Due to the growing practice of subinfeudation, much opposition was created against the custom, finally culminating in the famous statute of quia emptores. [18 Edw. I, cc. 1, 3, 1290.] This statute prohibited subinfeudation, and enacted that the grantee should hold immediately of the superior lord and not of the grantor. After this statute a conveyance passed all the grantor's interest to the grantee, and the grantor dropped out of the feudal chain between the tenant in possession of the land and the lord paramount, and had no further connection with the land granted. No new tenure in fee could be created. The statute, however, expressly provided that it should extend 'only to lands holden in fee simple'; consequently an estate for life or in tail can be granted, under the statute, to be held of the grantor. While the statute put an end to the subinfeudation of estates in fee simple, it established, on the other hand, the right of free tenants to alienate their lands. It thus became one of the period points in the history of English law. The principles of this statute have, as a rule, to the extent that tenure has here existed, been the law of this country, 'as well during its colonial condition as after it became an independent state.' In a few of our states, however, due either to the form of the original colonial grant, or to the theory that no tenures exist, it is said that the statute of quia emptores is not in force."[7]

Tenures in America

Feudalism as a system had been abolished in England before the American Revolution, and "the only feudal tenure ever recognized in this country was that of free and common socage, that being the tenure upon which all the grants of colonial land by the crown were based. * * * After the Revolution, even the shadowy subservience to sovereignty evidenced by the socage tenure became distasteful, and many of the colonies, upon attain-

[7] Burdick on Real Property, (hereinafter cited "Burdick"), pp. 52, 53.

ing their independence, at once passed acts, either abolishing all tenure in terms or declaring their lands for the future to be held upon an allodial (in contradistinction to feudal) tenure."[8]

The Feud or Tenement

The foundation of tenure was the feud or tenement, usually consisting of possessory rights in land held in demesne (dominion, possession), or nonpossessory rights of lordship over land in the demesne of a tenant, "but it might be a right to nominate the parson of the parish church, to take a rent, to collect a toll, to operate a mill, to hold an office in the manor, to receive a revenue in money or provisions, or any other valuable right capable of being held of a superior. These rights of lordship and other nonpossessory rights were the mysterious 'incorporeal hereditaments' of later days. The greed of the lords and the ingenuity of the Norman lawyers permitted few such rights to escape the system of feuds."[9]

The Manor

The manor was a unit in the feudal system of landholding. All the tenants of a manor held their lands dependently of the lord of the manor, a manor being "a district or large tract of land granted to a lord with power to parcel the land among subordinate tenants on condition of the rendition of services by them, and with power to hold a 'court'; that is, a general governing council, for administering the customs of the manor, settling disputes of property between tenants, and determining their feudal rights and duties. * * * The characteristics of a typical manor, any of which, however, might be lacking in individual manors, were the following: (1) The manor coincided geographically with the vill or township. It was, in fact, a feudal organization superimposed upon an Anglo-Saxon village community. The same group of men who, in private law, were lord and tenants of the manor, owing duties to one another, were, in public law, inhabitants of the vill, owing duties to the crown or state. (2) Within the manor, the lord and each tenant, free and unfree, had his house and arable lands, and all had rights in common in the wood and pasture land or 'waste.' The arable lands of the entire manor usually lay in two or three great fields, and in these fields the lands of the lord of the freeholders, and of the villeins lay in

[8] Minor & Wurts on Real Property, p. 12. "Allodial," meaning free; not holden of any lord or superior; owned without obligation of vassalage or fealty; the opposite of feudal.

[9] Bowman, pp. 147, 148.

intermingled strips. (3) The manor was managed and operated as an entirety by the lord's steward or bailiff. (4) The lord held a 'court' for the tenants, which was partly a council exercising general governmental power and partly a judicial tribunal with civil and criminal jurisdiction in applying the customs of the manor."[10]

Abolition of the Feudal System

The feudal system was strong in England during the reigns of William the Conqueror and his immediate successor, but from the accession of Henry I it began to lose its military character until, during the reign of Charles II in 1660, a statute[11] was enacted which provided that lands held in tenure by knight service should thereafter be held by free and common socage and that all future grants of hereditaments should be held in socage tenure. This statute may be said to have terminated feudalism as a system in England.

OWNERSHIP

45. "Ownership," in the law of property, means the totality of rights, powers, privileges and immunities which constitute complete property in a thing.[12]

In this sense ownership is not a simple concept, but consists rather of a complex collection of interests or rights in or to a thing of economic value. Thus, a person having complete ownership of a thing not only has the right and power to convey it to another but he also has the rights of possession and use and to direct how it shall be disposed of upon his death. However, the property in a thing may be divided and the right and power to convey it may be vested in one person while the rights of possession and use are in others. For example, the owner of land may lease it to another. The result is a division of the rights of complete ownership. Both the lessor and lessee have interests in the land secured by legal rights. The rights of possession and use are in the lessee by reason of the interest he acquired with the lease, but the lessor, by not having conveyed complete owner-

[10] Bowman, pp. 148, 149.

[11] 12 Car. II, c. 24, §§ 1, 2, 4.

[12] For a discussion of the terms "owner" and "ownership" see Restatement of the Law of Property, Vol. 1, § 10, and comments, pp. 25–30.

ship, has retained an interest which is protected by the law and which he can alienate, subject to the lease.[13]

Restrictions on Ownership

The Constitution of the United States[14] provides in substance that no person shall be deprived of his property interests or rights by the federal or state governments without due process of law, but these guarantees do not prevent property interests and rights from being subject to various general restrictions and conditions so long as such limitations are imposed and effected by "due process of law"; and, using the term "property" to denote the things which are the objects of property rights as well as such rights, property is subject to the following general conditions: (1) Property must be used so as not to interfere with the rights of others; (2) The property of a person may be taken for the satisfaction of his debts; (3) The property of a person is held subject to the right of the government to tax it; (4) The property of a person may be taken for public use, upon payment of just compensation, through the eminent domain power of the government; and, (5) The property of a person is held subject to valid exercises of the police power of the state, which is the power of government to make reasonable regulations for the general welfare.

POSSESSION

46. The term "possession," in law, signifies the physical relation existing between the subject (owner) and the object of a property right.

Generally, in order for a person to be considered in law as having actual possession of a thing, he must have an intent to possess it and physical control of it. These are the elements of the relation and the legal requirements that ordinarily must be met to establish it. However, the extent to which these requirements must be fulfilled varies in degree with the facts and circumstances of different cases. Actual possession is a factual concept and its elements are relative. Thus, the requirement that a person must have physical control of a thing to be held as in possession of it does not necessitate an absolute control but only such as the nature of the thing permits. Actual possession of a thing may be rightful, that is legally consistent with the rights of the owner, or it may be wrongful, in violation of the legal rights of the owner.

The requirements that must be met to establish actual possession need not be satisfied to invoke the protection provided by the legal doctrine of constructive possession, a device of the law used for the purpose of achieving various desired ends. Under this doctrine a person who is entitled to actual possession of a thing which is in the actual possession of no one, is regarded as being in possession of it. Consequently anyone stealing the thing may be held guilty of larceny.

[13] The term "owner," used to denote the person having rights in things, is ambiguous as it is used in reference to persons having incomplete ownership in things as well as in reference to persons who have complete ownership in things, and in a still broader sense it is used to denote a person who is the subject of any legal right, whether or not such right is a property right, or right in or to a thing of economic value. Its precise meaning must be ascertained from its context.

[14] See Am. 5, and Am. 14, § 1, U.S. C.A.Const.

CORPOREAL AND INCORPOREAL PROPERTY

47. Property rights, according to the tangibility or intangibility of their objects and the authority of their owners to possess their objects, are either corporeal or incorporeal.

Property rights either do or do not entitle their owners to the possession of their objects, and their objects are either tangible or intangible, consequently property rights are accordingly classified as corporeal or incorporeal. Corporeal property rights are those which entitle their owners to the possession of tangible things; all other property rights are incorporeal. And those rights which are incorporeal are of two kinds, the first kind including both nonpossessory rights over tangible things and incumbrances over intangible things; whereas the second kind includes only rights of ownership in intangibles.

Rights to the physical occupation or actual possession of land and material chattels are corporeal rights; and incorporeal rights are divisible into those which may become corporeal and those which cannot become corporeal. Of the former kind of incorporeal rights are those of a landowner who has leased his land to another for a term of years. During the period of the lease the rights of the lessor are incorporeal because, although their object is tangible, they are of a nonpossessory nature. However, when the lease is terminated at the expiration of its period the rights of the lessor have become corporeal because they entitle

him to retake possession. Of the second kind of incorporeal rights are those of a person who is the owner of an intangible thing of economic value such as a patent or copyright. Such rights cannot become corporeal.

REAL AND PERSONAL PROPERTY

48. Property rights are classified according to the movability of their objects as real property (realty) or as personal property (personalty).

In General

The terms "real property" and "personal property" in Anglo-American law have resulted from the early common-law real and personal actions. Originally the terms real and personal denoted the difference between forms of action by which rights were redressed, rather than the difference between the objects of property rights. Real actions were those by which things themselves could be recovered, whereas personal actions were those by which damages were recoverable from the person; and because of the importance of landholding under the feudal system and the various types of tenure which did not apply to things other than land, or chattels, real actions were largely available for the recovery of land only, a personal action being the appropriate remedy if the thing involved were a chattel. As a result of these differences in the forms of action, the terms real and personal eventually came to denote the kinds of property involved in causes for which the two forms of action were available. All things which could be recovered in real actions were real property, all other property was personal. Generally, therefore, real property consists of rights in land and personal property consists of rights in chattels, but not all rights in land are considered as realty. Only interests in land that are "freehold" interests constitute real property, a freehold interest being one which endures for the life of some person, or longer. Nonfreehold or leasehold interests which exist for a term of years were not originally recoverable in a real action, no such action being available for them; and, consequently, interests in land which are not freehold interests are considered as personal property.[15]

[15] "Chattel interests are, however, in some states made real property by statutory definition." Burdick, p. 24.

Lands, Tenements, and Hereditaments

"The older writers, when speaking of 'things real,' or what we, in modern times, designate as 'real property,' use the words 'lands, tenements, and hereditaments.' 'Things personal' were designated by the phrase 'goods and chattels.' A tenement is anything of a permanent nature that can be made the subject of feudal tenure; that is, a tenancy. It is a broader term than land, since it includes incorporeal rights, as, for example, rents and commons. There must, however, be an estate of freehold in order to constitute a tenement. Hereditaments are things which can be inherited; that is, which, on the death of the owner intestate, (without will), descend to the heir."[16]

Hereditaments

Hereditaments, at common law, are either corporeal or incorporeal, the former being those which are of a visible and tangible nature, whereas incorporeal hereditaments are those of an intangible character.[17] These incorporeal hereditaments, according to Blackstone, consisted principally of ten kinds: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents.

Advowson

An advowson was the right which the patron of a church or of an ecclesiastical benefice had to select the incumbent of that benefice. Like tithes, advowsons were incident to the English ecclesiastical system. Every parish had its patron who had a certain control over its affairs. This patron could be the crown, an archbishop, a bishop, or a member of the nobility, and one of the elements of his power was that of nominating the rector or vicar who officiated in the parish church and who was entitled to the emoluments of the benefice. The bishop was generally obliged to confirm the patron's nomination or "presentation" as it was termed, unless the nominee was canonically disqualified. This right of presentation was an advowson. It was not in any sense the ownership of the church but merely a right to nominate the clergyman of the parish, and a convenient means of providing for one in whom the patron was interested.

[16] Burdick, p. 4.

[17] "An incorporeal hereditament is anything that can be the subject of property which is inheritable but not tangible or visible." Burdick, § 11, p. 21.

Tithe

A tithe was the right which the incumbent of an ecclesiastical benefice had to receive one-tenth of the income of the inhabitants of the parish. This right was the means employed by the English government to provide for the temporal welfare of the ministers of the established church and by virtue of it the rector or vicar was entitled to one-tenth of the net profits obtained from the lands, the live stock, and from personal industry. As the right of tithes was incident to the office of rector or vicar, such office was called a "benefice."[18]

Common

The right of common was the right of one person to take a profit from the land of another and grew out of the organization of the English manor. The lands within a manor were separated into three categories: (a) the "demesne land," which consisted of that reserved by the lord for his own use and cultivation; (b) the "tenemental land," or that which was distributed among the free tenants; and, (c) the "waste land," or that which was uncultivated. It was the waste land that was subject to the right of common. Rights of common which were possessed by all inhabitants of the manor, were of four kinds: (1) common pasturage, or the right to pasture domestic animals on the waste land; (2) common of piscary, or the right to fish in the lakes or streams on or bordering the waste land; (3) common of turbary, or the right to take turf from the waste land; and, (4) common of estovers, or the right to take wood therefrom. Later, the right of common was extended to include any right on the part of one person to take pasturage, wood, turf, fish, or any profit whatever from the land of another.

Way

A way, or right of way, was the right of one person to pass over the land of another. Unlike a common it did not permit the taking of corporeal things from the land but merely permitted the person having the right to pass over the land of another along a route selected with regard to the convenience of the parties interested. Ways were either public or private, a public way being one which was available to any member of the public, a private way being one which was possessed by a private individual.

[18] A tithe from lands in the form of produce thereof such as grain or wood was called "predial"; a tithe which consisted of the produce of live stock such as wool or milk was termed "mixed"; and a tithe from personal industry was called "personal."

Office; Dignity

An office consisted of the right to exercise either a public or private employment and to receive the profits therefrom. A dignity, on the other hand, was the right to enjoy a title of nobility.

Franchise

A franchise was a royal privilege or branch of the king's prerogative existing in the hands of a subject or group. They usually arose from a grant of the king but in some cases could be held by prescription, that is, by reason of a long use from which the law would presume an original grant. For example, it was a franchise "for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession, and to do other corporate acts."[19]

Corody

A corody was the right of a person to receive certain allotments of provisions for his maintenance. A right of a person to receive certain payments in money for his maintenance, rather than allotments of goods, was termed a "pension."

Annuity

An annuity was the right of one person to receive a periodical sum of money from another person under a voluntary obligation assumed by the latter. Annuities came from persons other than ecclesiastics, whereas corodies were usually from ecclesiastical persons. Both were merely personal charges, but inheritable under English common law.

Rent

A rent was the right of one person to have rendered to him a certain periodical profit from land held by another, and there were three forms at common law: (1) rent-service; (2) rent-charge; and, (3) rent-seck. Under the first, the profit consisted in whole or in part of personal services of the tenant, and if he failed in the performance thereof the landlord was entitled to retake possession of the land although no power of distress or

[19] Browne's Blackstone's Commentaries, p. 179.

re-entry was reserved in the instrument by which the property had been conveyed. Rent-charge, on the other hand, was that species of rent which existed when one granted to another his whole interest in land, reserving an annual rental out of the land itself.[20] In this situation the grantor had no power to retake possession upon default in rent payments unless such power had been reserved in the grant, consequently such a clause was invariably inserted. Such rent was called "rent-charge" by reason of its being a charge or burden on the land. If no power of re-entry or distress was reserved in the grant the right of the grantor to periodical profits from the land was called rent-seck.

Incorporeal Hereditaments in the United States

In the United States, rights which persons may have in lands owned by others and often classified as "incorporeal hereditaments" consist principally of easements, profits a prendre, rents, and franchises.[21] "Such rights are incorporeal, in that they issue out of, or are annexed to, things corporeal. They may also be of an inheritable quality, although they are not necessarily inheritable."[22]

Easements

An easement is the right which the owner of one parcel of land has, by reason of such ownership, to use the land of another for a certain, defined purpose not inconsistent with the general property of the latter but without taking any profit therefrom. The parcel subject to such right is termed the "servient" land, whereas the parcel to which such right is attached is termed the "dominant" land. "The essential qualities of true easements are: (1) They are incorporeal; (2) they are imposed on corporeal property, and not upon the owner thereof; (3) they confer no right to a participation in the profits arising from such property; (4) they are imposed for the benefit of corporeal property; (5) there must be two tenements, the dominant, to which the right belongs, and the servient, upon which the obligation rests."[23]

Easements are classified as: (a) continuous and non-continuous; (b) appurtenant and in gross; (c) affirmative and negative; (d) of necessity and not of necessity; (e) equitable or quasi; and, (f) private or public.[24]

Easements may be created: (a) by grant, express or implied; or, (b) by prescription, in case of adverse user continued for the

[20] If the rent was charged upon an estate in fee, it was called a "fee farm rent."

[21] In this country, "there are no advowsons, tithes, dignities, nor corodies; commons are rare; offices are rare or unknown; and annuities have no necessary connection with land." Burdick, p. 22.

[22] Burdick, p. 403.

[23] Burdick, p. 404.

[24] "Continuous easements are said to be rights of a continuous nature, the enjoyment of which may be continued without the necessity of any human interference, as a right to lateral or subjacent support, a right to light and air, a right to an open drain, or to water courses. A non-continuous easement, on the other hand, is an intermittent enjoyment of a right, an enjoyment to be had only by the interference of man, such as rights of way, or a right to draw water. Another classification of easements is that which divides them into easements appurtenant and easements in gross. The former class comprise easements proper, which cannot be severed from the tenement with which they are connected; that is, an easement [which] belongs to an estate, and not to a person. Easements in gross, however, are not connected with any parcel of land, and exist in a person or in the public. It is, however, said that, strictly speaking, there can be no such thing as an easement in gross, since it is necessary that in every easement there should be both a servient and a dominant tenement. There is, however, a class of rights which may be exercised by individuals without any occupancy of a dominant tenement, a mere burden or servitude resting upon one piece of land for the use of a person, and such burdens have been conveniently classed as easements in gross. Highways have been classed as easements of this kind, also easements in respect to the flowage of water, as, likewise, a right to draw water from a well. Easements are also divided with respect to the obligation imposed on the owner of the servient estate, into negative easements and affirmative easements. Under the former the owner of the servient estate is prohibited from doing some acts of ownership on his own property, as an easement that land shall not be built upon, while in the case of an affirmative easement the owner of the servient estate is merely required to permit something to be done on his land, such as piling materials on it. Easements of necessity, as distinguished from easements not of necessity, are easements that are necessary for the use of the tenement, without which the land could not be used at all. They are easements which pass by implication or construction of law. Easements of necessity are sometimes called natural easements, in distinction from conventional easements, which arise by the agreement of the parties. Easements are also sometimes distinguished as equitable or quasi easements. They are not strict easements, but may arise between two pieces of land owned by the same person, when the enjoyment by one piece of a right in the other would be a legal easement, were the pieces owned by different persons. For example, an owner of two lots may construct a drain for one of them across the other, and then sell either of them. In such case, if he transfer the dominant estate, the right to drain across the remaining lot will continue; and the same result may obtain if he transfers the servient estate to one who has knowledge of the existence of the drain, and the easement is necessary to the enjoyment of the other lot. Another classification of easements sometimes employed is that of private and public easements. Private easements are

time required by the statute of limitations. And they may be terminated by: (a) release; (b) license to the servient owner; (c) abandonment; (d) obstructions amounting to abandonment; (e) merger; (f) operation of law; (g) adverse possession; (h) cessation of their necessity; (i) appropriation to public use.

The principle rights and incidents arising from easements are: (a) the dominant owner must use his easement, and the servient owner his estate, in a reasonable manner; (b) the dominant owner must repair the easement; and, (c) the servient owner must not obstruct the easement.

The most important easements are the following: (1) Rights of way, or the right of one person to have a passage on an established line over land of another. (2) Highways, or a right of way enjoyed by the public. (3) Light and air, or an easement to the uninterrupted flow of light and air to the windows or apertures of a building from over adjoining land. (Such rights may be acquired by grant, in this country, but not, as a rule, by prescription.) (4) Lateral and subjacent support, the former being the right to have one's land supported in its natural state so that it will not sink when an adjoining owner makes an excavation. (The right of subjacent support is similar, but applies to vertical rather than to horizontal situations and arises when the surface of land and the strata beneath are owned by different persons.) (5) Party walls, or a right in a wall between two estates which is used for the common benefit of both. (6) Easements in water, and, more particularly, in water of artificial channels. "The owner of land fronting on a natural stream or water course has, at common law, a right to have it maintained in its natural channel, without diminution of its quantity, or impairment of its quality, excepting the reasonable use of the same by other riparian owners. Such a right, however, is a natural right, and is not an easement. Easements in water courses are usually found in connection with water flowing in artificial channels. There may be however, easements in connection with natural streams."[25]

easements proper; that is, there is both a servient and a dominant estate. Public easements are not strict easements. They are enjoyed by the public, and there is no dominant estate. They are illustrations of what are termed easements in gross." Burdick, pp. 405–408.

[25] Burdick, § 179, p. 433.

Profits a Prendre

A profit a prendre, analogous to the old common-law right of common, is a right of one person in the lands of another which entitles the owner of the right to participate in the profits of the land. That is to say, a profit a prendre is a right to take profits from the land; its soil or produce. Such a right is distinguishable from an easement in that the latter does not entitle its owner to take profits from the land. Profits a prendre may be created by grant or by prescription and may be as various as the nature of the soil and the things which grow thereon or which are imbedded in it will permit.

Rents

Rent, as usually understood, "may be defined as a compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the tenant thereof. The term 'rent' is used, however, in different senses, and in its largest sense it means all the profits issuing out of lands in return for their use. In the sense that rents issue out of the thing granted, and are no part of the thing or of the land itself, they are incorporeal hereditaments."[26]

Franchises

A franchise has been defined as "a special privilege or immunity of a public nature, conferred upon individuals by legislative grant, and which cannot be legally exercised without such grant. * * * All franchises are supposed to be for the public good, and a franchise is in the nature of a contract, being, on the one hand, a grant by the state or a municipality of certain rights and privileges which could not be otherwise exercised, in consideration for certain benefits to the public to be supplied by the grantee. A failure of the grantee to carry out the purposes for which the franchise was granted gives cause for forfeiture of the franchise. Forfeiture, however, can be obtained only at the suit of the government. * * * Among the familiar illustrations of franchises may be mentioned rights to collect tolls and charges in connection with public ferries, turnpike roads, public markets, public wharves, and public bridges; rights to construct and operate railroads; and rights to construct and maintain water plants, gas plants, and electric light plants."[27]

[26] Burdick, p. 444.

[27] Burdick, pp. 449–452.

Meaning of Term "Land"

The term "land," in its legal sense, includes the ground, soil, or surface of the earth; fields, meadows, pastures, woods, moors, waters, marshes and heath. It also includes minerals and fossils beneath the surface, and buildings, grass, trees and rocks. It is said to include "everything under it and everything over it, extending upward indefinitely and downward to the center of the earth, giving rise to the maxim 'cujus est solum, ejus est usque ad coelum et ad inferos.' (To whomsoever the soil belongs, he owns also to the sky and to the depths.) With reference to its ownership, however, land may be divided horizontally, so that one person may own the underlying strata, having the right to the minerals, or to construct a tunnel therein. Land may, of course, have, in any particular case, a restricted rather than a general meaning, according to the construction of its special use in a deed, will, contract, or other instrument. The term in some states is defined by statute."[28]

Fixtures

Things which are the objects of real property rights, or real property, may become personalty by being disconnected from land, and things which are the objects of personal property rights, or personal property, may become real property (or "fixtures") by being annexed to land. Hence, "a fixture is a chattel that has been annexed to a building or to land, under such circumstances as to cause it to lose its original character of personal property, and to become a part of the realty. * * * Speaking literally, a fixture is anything that is fixed or attached to some other thing. In the law of real property, buildings erected upon land and chattels annexed to land or to buildings on the land are called 'fixtures.' When the annexation is made by the owner in fee of the land, such fixtures become real property. They may, however, again become personalty by being actually severed from the land with such intent. Where, however, the annexation is made by the tenant of an estate less than a fee, it is not always easy to determine whether such articles become realty or remain personalty. Things annexed by a tenant sometimes become realty, and sometimes do not. The question is of importance, because, if the chattels become realty, they cannot be lawfully severed or removed by the tenant, while if they remain personalty, notwithstanding their annexation, they may

[28] Burdick, p. 12.

be removed by the tenant before the expiration of his term. There is great conflict in the cases over the question of what constitutes 'fixtures.' The term is used in three senses: First, as meaning simply chattels which are annexed to realty, irrespective of whether they may be removed or not; second, as meaning irremovable fixtures; and, third, as meaning removable fixtures. The resulting confusion of the cases is natural. Some writers have tried to avoid this confusion by calling those fixtures which cannot be lawfully removed 'real fixtures,' because they have become realty, and calling fixtures which can be lawfully removed 'chattel fixtures,' because they remain personal property. The rules for determining fixtures are not in harmony. Speaking generally, however, whether or not articles affixed to the land are fixtures may be determined in the following ways: (1) By express contract of the parties concerned. (2) In some states by statutory provisions. (3) By the implied intention of the parties, as gathered from the following facts: (a) The mode or manner of the annexation. (b) The purpose of the annexation. (c) The adaptation of the article to the realty. (d) The possibility of removing the article without serious injury. (4) By the character or relation of the party making the annexation, whether, for example, the owner in fee, tenant for life, or tenant for a term less than life. (5) By the nature of the chattels annexed, whether, for example, in the case of landlord and tenant, the articles are used for trade, agricultural, or domestic purposes."[29]

Realty and Personalty; Differences

The character of a thing as realty or personalty is important because of fundamental differences in the legal precepts applicable to the two kinds of property. "The modes of transferring real and personal property are different. * * * On the death of the owner, realty passes at once to the heir or devisee, while personalty goes to the personal representative, and through him to the distributee or legatee. The personal property of a decedent must be used before the realty in paying his debts. There are differences in the form and place of bringing actions for damages to lands and chattels. * * * In the law of marriage, the rights of the husband, at common law, are not the same with reference to the real property of the wife as in the case of her personal property, and the common-law estates of dower and curtesy apply to real property alone."[30]

[29] Burdick, pp. 25, 26.

[30] Burdick, pp. 8, 9.

CHAPTER 10

DIVISIONS OF LAW

IN GENERAL

49. Municipal law determines or regulates:
(a) The organization, powers, and functions of the state,
(b) The relations of the state with individuals, and
(c) The relations of individuals with each other.
It divides analytically into:
(a) Public law,
(b) Private (or civil) law,
(c) Criminal law, and
(d) The law of persons.
It divides functionally into:
(a) Substantive law, and
(b) Adjective law.
And it has extraordinary or special and separate branches which include:
(a) Military law,
(b) Martial law,
(c) Maritime law, and
(d) Conflict of laws.[1]

In general, that part of municipal law which deals with the organization, powers, and functions of the state and its relations with individuals is called public law, whereas that part of municipal law which deals with the relations of individuals with each other constitutes what is called private law. However, a third division, criminal law, deals in part with relations between the state and individuals and in part with relations of individuals with each other. Consequently criminal law is classified by some writers as public law, by others as private law, and by still others as it is classified here, that is as coordinate with public and private law. Private law, apart from criminal law and all special divisions, is called civil law. Personal law, or that part of municipal law which pertains to special classes of persons, is supplementary of public, private, and criminal law.

[1] See Bowman, § 54, p. 111.

Functionally, municipal law is divided into substantive law and adjective law.[2] Substantive law is that by which individual, state, and societal interests are given legal recognition and which defines primary rights; whereas adjective law is that which creates and defines remedial rights and which deals with the methods of effectuating primary rights in courts. This division applies to public, civil, criminal, and personal law. Each has its substantive precepts, giving rise to primary rights; and its adjective rules and rights by which legal redress may be had when the interests protected by the primary rights are infringed.

The foregoing classes pertain to the ordinary municipal law, without reference to the military establishment, war, or maritime matters for which there are three special divisions of law, namely, military law, martial law, and maritime law. And in addition to these three special divisions, there is a fourth, called conflict of laws, which determines the effect the law of one state shall have in the courts of another state.

SUBSTANTIVE LAW

50. Substantive law divides analytically into:
(a) Public law,
(b) Civil law,
(c) Criminal law, and
(d) The law of persons.[3]

Public Law

Public law subdivides into (a) constitutional law, and (b) administrative law. Constitutional law deals with the organization, powers, and functions of the state; whereas administrative law deals with "the functions of public officers and commissions, particularly in their relations with private persons."[4]

[2] This functional division of the law into that which is substantive and that which is adjective has determined, in general, the arrangement and subject-matter of parts 1 and 2 of this book, but for reasons of expediency the analysis set forth in this chapter has not been strictly followed in either the selection or the arrangement of the material contained in the other chapters and parts.

[3] See Bowman, § 55, p. 113.

[4] Bowman, § 56, p. 113.

Civil law

Civil law is concerned with private rights which are classified as primary and subdivides into (a) the law of obligations, (b) the law of property, and (c) the law of torts. The law of obligations is that which recognizes interests and defines primary rights in personam, that is, rights of one definite and ascertained person or group against another. Hence it is distinguishable from the law of property and the law of torts which deal generally with rights in rem. The law of obligations includes the law of contracts and of quasi contracts, and the laws which recognize interests in various other special relations giving rise to primary rights in personam. The law of property is that which recognizes interests and defines primary rights in rem which pertain to the possession, enjoyment and disposal of corporeal and incorporeal things of economic value. The law of torts is concerned primarily "not with the recognition and definition of rights, but with infringements of rights. It deals (1) with infringements of all rights in rem, whether pertaining to person or property; and (2) with infringements of those rights in personam, or obligations, which are normally redressed at common law by actions of the kind called actions ex delicto."[5]

Criminal Law

Criminal law is that which treats of crimes and their punishments. It is that law which forbids acts deemed deleterious to public or social interests (crimes), and which provides for the punishment of persons committing such acts by means of proceedings brought by public officers in the name of the state.

The Law of Persons

The law of persons is that which deals with the peculiarities in the status of special classes of persons such as infants and married women, to whom the law accords exceptional or incomplete capacity for legal rights and their correlatives. "The ordinary law, in its public, civil and criminal divisions, is a law for persons having normal legal capacity for rights, duties and liabilities. Hence the law of persons, as a separate division, reduces to the law pertaining to persons having incomplete or exceptional legal capacity. It is thus a sort of appendix or supplement to each of the other three divisions, comprising those modifications of legal precepts which are provided for special classes

[5] Bowman, p. 115.

of persons, and in a few cases for ordinary persons in some special relation (e.g. marriage)."[6]

ADJECTIVE LAW

51. Adjective law divides analytically into:
(a) Adjective public law,
(b) Civil procedure,
(c) Criminal procedure, and
(d) The adjective law of persons.[7]

Adjective Public Law

Adjective public law subdivides into: (a) extraordinary legal remedies; and, (b) ordinary actions at law and suits in equity on behalf of the state. The former, originally known as "prerogative writs," are the writs of mandamus, quo warranto, prohibition, certiorari, and habeas corpus. Formerly, in England, "the prerogative writs were the means used by or on behalf of the crown to control or restrain the acts of inferior courts, administrative officers, and corporations, and would not issue at the suit of a private person. In modern practice, this prerogative character has been discarded, and while the theory of the writs is much the same, namely, that of enforcing public duties to the state, they may be used by a private person when the relief given by them is appropriate to the protection of his interests."[8] In many other cases the state maintains public and societal interests by means of actions at law and suits in equity such as are ordinarily brought by private persons.

Civil Procedure

The law of civil procedure provides and regulates the method by which violations of primary rights are redressed in court and includes whatever is embraced by the technical terms "pleading," "practice," "evidence," "judgments," and "executions." "Pleading is the written statement of what is alleged on one side and denied on the other, by which the precise questions of law or fact in dispute between the parties are formulated for decision. Practice comprises trial practice and appellate practice. The former includes: (1) the means by which a plaintiff may come, or the defendant may come or be brought, before the court (appearance and process): (2) the form, manner, and order of conduct-

[6] Bowman, p. 115.
[7] See Bowman, § 60, p. 116.
[8] Bowman, pp. 116, 117.

ing the proceedings in the trial court through the various stages to pleading, and after pleading to judgment; (3) the means of procuring in the trial court, either before or after judgment, the correction of errors. Evidence is the means by which the parties supply the court with the data necessary for the decision of questions of fact. In its practical aspects it consists of the rules and principles employed by the courts in excluding or admitting data offered as proof by the respective parties. Judgment is the decision of the court; an interlocutory judgment, or order, being a decision made during the progress of the proceeding which does not finally determine or complete the action; a final judgment being the ultimate decision, determining the rights of the parties unless it is set aside upon review by an appellate tribunal. Execution is the means by which the judgment is enforced when voluntary submission thereto is withheld. Appellate practice is the form, manner, and order of conducting proceedings in an appellate court for the correction of errors alleged to have been made by the trial court."[9]

Criminal Procedure

The law of criminal procedure is that which provides and regulates the means and methods for the apprehension and prosecution of persons believed to have committed crimes, and for their punishment if convicted. It is comprised of substantially the same parts as civil procedure although they vary in detail.

The Adjective Law of Persons

The adjective law of persons is the law that regulates the proceedings by which the status of abnormal legal persons or personalities, and certain variations in the status of normal legal persons or personalities, are judicially determined. "The status of persons, both those having normal and those having incomplete or exceptional capacity for rights, duties and liabilities, is for the most part determined incidentally in the course of ordinary public, civil or criminal proceedings;"[10] consequently, this division of the adjective law contains a somewhat miscellaneous collection of rules and principles which regulate such proceedings as those for the separation and divorce of married persons, the adoption of children, and other analogous proceedings that treat of and affect the status of persons.

[9] Bowman, p. 117.

[10] Bowman, p. 118.

MILITARY LAW

52. Military law consists of a system of precepts for the organization and government of the army and navy, and of the militia when called into actual service.

Military law is that part of municipal law which applies only to persons of the army and navy. It is a system of legal precepts superadded to the ordinary law, and except to the extent that it may be modified temporarily by martial law, military law regulates the military conduct of men in the land and naval forces at all times and in all places, in time of peace and during war, and without as well as within the territorial domain of the state in whose service they are engaged following them wherever they may go in the performance of military duty or the prosecution of military undertaking.

The Constitution of the United States[11] grants to Congress the power to declare war; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States. It also makes the President commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the service of the United States,[12] and further provides that no State shall, without the consent of Congress, keep troops or ships of war in time of peace, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay.[13] In addition to these constitutional provisions, the military law of the United States comprises various acts of Congress, particularly the Articles of War (for the army)[14] and the Articles for the Government of the Navy;[15] the Army Regulations and the Navy Regulations proclaimed by the President as commander-in-chief in conformity with acts of Congress; and the usages of the land

[11] Art. 1, § 8, U.S.C.A.Const.

[12] Art. 2, § 2, U.S.C.A.Const.

[13] Art. 1, § 10, U.S.C.A.Const.

[14] Title 10 of the United States Code Annotated, entitled "Army," contains acts of Congress relating thereto, including the Articles of War.

[15] Title 34 of the United States Code Annotated, entitled "Navy," contains acts of Congress relating thereto, including the Articles for the government of the Navy.

or naval service and of war which constitute an unwritten system applicable to cases not within written regulations.

MARTIAL LAW

53. Martial law consists of a system of precepts imposed and enforced by military power in time of war or great public danger.

Martial law is comprised of such rules and methods of public control as are put into effect by the military establishment over territory in which, by reason of war or public disturbance, the civil government is displaced or is inadequate to preserve order and enforce the ordinary municipal law. It is distinguishable from military law in that it is applicable to all persons within the district subject to it, whether soldier or civilian, and in that it is not permanent but ceases with the emergency that brings it into effect.

There are three kinds or grades of martial law: "(a) Military government, or the law of military occupation, by which in time of war a military commander governs the invaded territory of an enemy in derogation of the ordinary law. (b) Military law proper, by which in time of war a military commander governs disloyal or disaffected domestic districts, so far as is required by military necessity and the public safety, in derogation of the ordinary law. (c) Qualified martial law, or military authority, by which in time of great public tumult or disaster the military arm of government aids the civil authorities in suppressing violence and enforcing the ordinary law."[16]

The authority to proclaim military government as an act of war in the invaded territory of an enemy is recognized by international law as vested in the commander of the invading army. However, "the authority to proclaim martial law proper, as an act of government within the United States, according to the prevailing view—there has been some difference of opinion—is vested by the Constitution in Congress, but in cases of imminent peril, when action by Congress is not promptly available, it may be put into effect, temporarily, by the President, subject to approval by Congress."[17] Authority to impose qualified martial law in aid of civil authorities for the suppression of violence and the enforcement of the ordinary municipal law during periods of

[16] Bowman, pp. 119, 120.

[17] Bowman, p. 120. And see authorities collected in 45 L.R.A.,N.S., p. 996 et seq.

insurrection, mob violence, and disasters such as earthquakes and floods is vested in the President, or in the governor or legislature of the State.

MARITIME LAW

54. Maritime law is that part of municipal law which relates particularly to traffic and business on the sea and other navigable waters, and admiralty jurisdiction is the power of a tribunal to hear and decide certain classes of cases arising under maritime law.

Maritime law is that part of municipal law which deals with ships, their crews and navigation, and which relates to marine contracts, torts, crimes, and property, to marine transportation of persons and property, and to water-borne commerce in general. Admiralty jurisdiction, on the other hand, is the power to hear and decide certain classes of cases which arise under maritime law, exercised by special tribunals or courts the procedure of which differs from that of ordinary courts in many particulars, but principally in their authority to proceed in rem; that is, against the offending vessel or cargo, instead of in personam, as in the ordinary courts, against the owner or owners summoned to appear and defend. "The extraordinary power to proceed in rem, like most of the other peculiarities of procedure which differentiate courts of admiralty from the ordinary courts, is derived from the civil law of Rome. It is based on the practical convenience of obtaining a monetary satisfaction for a maritime tort or breach of contract by arresting the offending vessel or other maritime property and subjecting it to judicial sale, although the owner or owners may be citizens of and resident in foreign states, and thus be beyond the power of the court to make them defendants by means of a summons or other ordinary process. When the court in such a case has observed the proper jurisdictional steps of seizing the property and publishing notice of the proceeding, its decree and the subsequent sale are binding upon persons in every part of the world and are recognized as valid by every court of admiralty in the world."[18]

[18] Bowman, pp. 121, 122.

CONFLICT OF LAWS

55. The Conflict of Laws is that part of the law which deals with the extent to which the law of a state operates, and determines whether the rules of one or another state should govern a legal situation. A Conflict of Laws problem is presented whenever a legal controversy arises in which there is a foreign element.[19]

The laws of different states or jurisdictions vary in many particulars, and a case which contains one or more foreign elements derived from one or more foreign jurisdictions requires resort to the precepts of conflict of laws. "No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states. That part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, be given effect or be applied is called the Conflict of Laws."[20]

For example: "A man domiciled in Minnesota dies, leaving a large personal estate, some of which is situated in Wisconsin. When the dead man's estate is administered, it will be distributed according to the Statute of Distributions in Minnesota, the state of his domicile. But that does not mean that this law of Minnesota reaches over into Wisconsin, and is allowed to be operative there as a matter of interstate courtesy. The only law operative in Wisconsin is Wisconsin law. But the law of Wisconsin is not limited to those rules governing transactions taking place there between its citizens. It contains also rules for determination of the effect of the foreign elements in a given case. It is the Wisconsin law of Conflict of Laws which declares that personal property of an intestate is to be distributed according to the law of the intestate's domicile at the time of death. That rule is law in Wisconsin, and declared through its courts, as a matter of general policy and convenience. * * * The same line of reasoning applies in other situations presenting a foreign law element. A plaintiff seeks to recover in a Minnesota court for a tort which he says was committed upon his person in Wisconsin. The Minnesota court, in passing upon the question of the defendant's liability, will settle it according to the rules prevailing in Wisconsin, where the alleged wrong took place. This is not because the Wisconsin law of torts has, for the time being, an extraterritorial operation through the courtesy of Minnesota, extended by means of its courts. It is because the rules of Conflict of Laws form part of the common law of Minnesota, and the Conflict of Laws principle applicable is that the liability for an alleged tort is determined by the law of the place where it occurred. Minnesota law governs, but Minnesota Conflict of Laws principles, not the local tort rules of Minnesota, govern in this case."[21]

The States of the Union are separate sovereignties except to the extent that the Constitution of the United States provides to the contrary, and consequently the recognition to be given in one state to the law of another is determined by the precepts of conflict of laws prevailing in the former, as would be the case if the law of a foreign nation were involved. However, by reason of the federal constitutional requirement that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State,"[22] the refusal of a State court to give a lawful judgment rendered by a court of another State the same force and effect that it has in the State where it was rendered, may be a denial of a constitutional right and subject as such to reversal for error by the Supreme Court of the United States. Such cases are governed by the United States Constitution and the acts of Congress passed thereunder, rather than by the rules of conflict of laws.

[19] Goodrich on Conflict of Laws, 2d Ed., § 1, p. 1.

The name "Conflict of Laws" and the most common alternative, "Private International Law," are not entirely accurate or appropriate. The term "Conflict of Laws" suggests two laws struggling to master a given situation, and this is inaccurate as the rules of the subject are used to select the precepts which govern a given legal situation. On the other hand, the term "Private International Law" is inaccurate as the rules of the subject are not a "private species of the body of rules which prevails between one nation and another," as they should be if the word "international" is taken in its accepted meaning. The principles of this subject are the commands of the sovereign in a given state and are not international; they determine private rights of individuals who may belong to the same nation. "Despite inaccuracies, however, the best scholars incline to reject the more or less fanciful terms which have been offered as a substitute for the two mentioned. No entirely satisfactory name has been suggested; the established ones do no harm if treated as mere names and not as supposedly accurate descriptive terms." Goodrich on Conflict of Laws, 2d Ed., p. 7.

[20] Restatement of the Law of Conflict of Laws, § 1, pp. 1, 2.

[21] Goodrich on Conflict of Laws, 2d Ed., p. 10.

[22] Art. 4, § 1, U.S.C.A.Const.

PART 2

THE SUBSTANTIVE LAW

CHAPTER 11

CONSTITUTIONAL LAW

IN GENERAL

56. Constitutional law is that division of law which treats of the nature, establishment, interpretation and application of constitutions.[1]

In the United States a constitution may be said to constitute the organic and fundamental act adopted by the people (either of the Union or of a particular state) as the supreme and paramount law of the nation or state. A constitution differs from an ordinary legislative enactment or statute in three important particulars: "(1) It is enacted by the people as a whole (that is, by vote of the qualified electorate) who are to be governed by it, instead of by their representatives in a congress or legislature. (2) A constitution can be abrogated, repealed, or modified only by the power which created it, namely, the people in the sense stated above, whereas a statute may be repealed or changed by the legislature. The people, however, can modify or repeal their constitution only through the medium of a constitutional convention or constituent assembly, or by affirmative popular vote on amendments or on a new constitution duly submitted by the legislature. In those states where the initiative and referendum are in use, the provisions of the constitution are as binding on the people in the exercise of their legislative prerogative as upon the legislature, that is, these devices cannot be used to alter the

1 For antecedent discussions of constitutions see §§ 14, 18, 30, and 33, supra.

"The subject matter of constitutional law consists of the fundamental legal principles in accordance with which the people of a politically organized society, or State, have established the system of government of such State." Rottschaefer on Constitutional Law, § 1, p. 5.

constitution in any other mode than as the constitution itself provides. (3) The provisions of a constitution refer to the fundamental principles of government and the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification in modern constitutions derogates from the precision of this last distinction."[2]

Meanings of "Constitutional" and "Unconstitutional"

"Constitutional" means conforming to the constitution; authorized by the constitution; not conflicting with the constitution. "It also means dependent upon a constitution, or secured or regulated by a constitution, as a 'constitutional monarchy,' 'constitutional rights.' Hence, in American parlance a constitutional law is one which is consonant to and agrees with the constitution; one which is not in violation of any provision of the Constitution of the United States or of the particular state."[3] On the other hand, a statute or ordinance which is inconsistent with the constitution or in conflict with any of its provisions, is said to be "unconstitutional." Thus, "an unconstitutional law is one which is in violation of the constitution of the country or of the state."[4]

Constitutional Rights

The Constitution of the United States and the constitutions of the several states guarantee various so-called "constitutional rights," classified according to their nature and for the purposes of constitutional law as natural or personal rights, civil rights and political rights. "Examples of natural or personal rights are the right to life, which includes not merely the right to exist, but also the right to all such things as are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual, and the right of liberty, which includes not only freedom from physical restraint, but also the unhindered enjoyment of all his faculties in all lawful ways. * * * All the essential personal or natural rights of citizens are fully secured and guarantied by provisions in the federal and state constitutions."[5]

The term "liberty," has been defined as "the lawful power in the individual to exercise his corresponding rights."[6] However, "the constitutional right to liberty does not contemplate unre-

[2] Black on Constitutional Law, 4th Ed., (hereinafter cited "Black"), pp. 3, 4.

[3] Black, p. 4.

[4] Black, p. 4.

[5] Black, p. 512.

[6] Black, § 203, p. 512.

strained license, but liberty regulated by law for the common good. The state has the right to take measures essential to its own preservation and to enact regulations for the dealing of citizens with each other. Also it is bound to protect the public health, safety, and morals against the aggressions of individuals, and thus the freedom of all may be limited by proper police regulations, as also, in some measure, by the exercise of the powers of taxation and eminent domain."[7]

Religious liberty is secured by provisions in the federal and state constitutions, but these provisions do not prevent or render invalid: "(a) Recognition of the fact that the great mass of the American people are adherents of the Christian religion. (b) Public recognition and encouragement of religion, where no constraint is put upon the conscience of any person. (c) The enactment of Sunday laws. (d) The enactment of laws punishing blasphemy as a crime. But the guaranties of religious liberty forbid and prevent—(a) The recognition of any particular form of religion as the established and compulsory religion of the state. (b) The appropriation of the public money or the public influence to the support of any church, sect, or religious body. (c) The persecution of any individual for conscience's sake, or the violation of his conscientious scruples. (d) Religious tests as a qualification for office."[8]

Personal liberty consists "of the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law, and also it includes the right of bodily integrity, that is, freedom from physical injury or degradation. But the right of personal liberty is limited, in accordance with law, in so far as may be necessary for—(a) The preservation of the state and the due discharge of its functions. (b) The securing of the rights of each member of the community against the others. (d) The due regulation of the domestic relations."[9]

Interests in property are also protected by the federal and state constitutions. "The constitutions of many states declare that men have a natural right to acquire, possess, and protect property, and the federal constitution forbids the deprivation of property without due process of law. But property is held subject to the reasonable exactions of the state and to regulation under the police power, and its use is limited by the condition that it must not interfere with the equal rights of others."[10]

[7] Black, p. 513.

[8] Black, §§ 204, 205, pp. 513, 514.

[9] Black, § 207, p. 521.

[10] Black, pp. 527, 528.

Various other personal and civil rights secured by the federal and state constitutions include the right of free contract; the right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures;[11] the right to obtain justice freely;[12] the right to a jury in civil[13] and criminal[14] proceedings; and so-called "vested" rights.[15]

The right to vote, or the right of suffrage, "is a political right and is regulated by each government in accordance with its own view of policy and expediency. In this country the right to vote is not conferred or guarantied by the federal constitution, but is left to be fixed and regulated by the several states, subject, however, to the limitations contained in the fourteenth, fifteenth,[16] and nineteenth[17] amendments. Where the constitution of the state defines the qualifications of those who shall be vested with the elective franchise, such qualifications cannot be altered by the legislature. But this does not deprive the legislature of the power to regulate the exercise of the right or the manner of conducting elections."[18]

The First Amendment to the Constitution of the United States provides: "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This guaranty of free speech and publication "secures to the citizen the right freely to criticise the nature, operations, institutions, plans, or measures of the government,"[19] but "is not unconstitutionally abridged by laws against the expression in public, whether in speech or print, of sentiments advocating or inciting to the revolutionary overthrow of government, criminal syndicalism, the commission of crime, or disrespect for and disobedience to law."[20]

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, but, "since the right here concerned is not restricted to citizens, but is recognized as being in 'the people,' an alien residing in the United States has a legal right to frame and circulate a petition to the President of the United States, and therein to comment fairly upon governmental policies and actions."[21] However, the people have the right to assemble for lawful purposes "though no petition is included within the scope of those purposes. Thus, if no unlawful purpose is involved, it is the right of a person to communicate his opinions through the medium of a public address, and the members of his audience are entitled to assemble in any proper place to hear it. But the time and place must be suitable and the gathering orderly and peaceable. There is, for instance, no constitutional right to hold a public meeting in the streets of a city, and a permit for that purpose may be required. But the importance of the clause under consideration lies chiefly in connection with political meetings, such as nominating conventions; and a statute which denies to the electors of the state or any part of it the right to nominate candidates for public office is in violation of this provision."[22]

Equal Protection of the Laws

The Fourteenth Amendment to the Constitution of the United States forbids a State from denying to any person within its jurisdiction the equal protection of the laws. However, "this clause does not undertake to confer new rights, but is simply prohibitory of certain kinds of state action or legislation. The 'equal protection of the laws' means the protection of equal laws, and requires every state to give equal protection and security to all under like circumstances, to the end that no greater burden shall be laid on one than on others in the same circumstances, the object being to prevent arbitrary and invidious discriminations and class legislation not founded on legal and reasonable grounds of distinction."[23]

[11] See U.S.C.A.Const., Am. 4.

[12] "In many of the states, the constitutions provide that every person ought to obtain justice freely, without being obliged to purchase it, completely and without denial, promptly and without delay. This provision is founded on the forty-seventh article of Magna Charta, wherein the king declares: 'We will sell to no man, we will deny to no man, nor defer, right or justice.'" Black, § 223, p. 561.

[13] See U.S.C.A.Const., Am. 7.

[14] See U.S.C.A.Const. Am. 6.

[15] "A vested right is the power to do or to possess certain things lawfully; it is a substantial property right, and may be created by common law, statute, or contract." Black, p. 540.

[16] (This amendment provides that, "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.")

[17] (This amendment provides that, "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.")

[18] Black, §§ 204–242, p. 640.

[19] Black, § 245, p. 652.

[20] Black, § 246, p. 654.

[21] Black, p. 657.

[22] Black, p. 657.

[23] Black, p. 567.

In respect of judicial proceedings, access to courts, the procedure therein and the treatment of litigants this clause forbids invidious discriminations but not reasonable classification if all similarly situated are treated alike. Thus, a state may prescribe a reasonable condition precedent to the bringing of a suit of a specified class so long as the basis of distinction is real and the condition imposed has a reasonable relation to a legitimate object; but a state cannot enact that some citizens may apply for and obtain a judicial remedy and forbid other citizens from doing so. However, this provision forbids "discrimination against persons of African descent in respect to their treatment in the courts, jury service, and all the ordinary rights and privileges of individuals before the law. But it does not prevent their separation from white people in the public schools and in respect to the service rendered by inns, carriers, and others dealing with the general public, provided the accommodations and facilities accorded to them are in all respects equal to those reserved for whites. In respect to where they may establish or occupy dwellings, they may not be segregated from white persons by any law or municipal ordinance, but restrictive covenants in deeds of private persons, accomplishing the same result, are not invalid."[24]

In short this clause forbids class legislation but it does not prohibit the classification of persons or things for purposes of legislation provided the classification is not arbitrary or capricious, but reasonable and founded on some sound principle of public policy or necessity.

Due Process of Law

The federal constitution prohibits the United States and the several States from depriving any person of his life, liberty, or property without "due process of law." "This phrase is derived from the forty-sixth article of Magna Charta, which declares that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or anyways destroyed, nor will we [the king] pass upon him or commit him to prison, unless by the legal judgment of his peers, or by the law of the land.' It is settled that the two phrases 'the law of the land' and 'due process of law' are of exactly equivalent import."[25]

As the clause "due process of law" had a settled meaning at common law, "it is always proper, in determining whether due

[24] Black, § 227, p. 575.

[25] Black, p. 591.

process of law has been denied, to look to the character of the proceedings involved for the purpose of ascertaining what the process at common law was and what the practice in this country has been in like cases. Any process, not otherwise forbidden, must be taken to be due process of law if it can show the sanction of settled usage both in England and this country. But as the fourteenth amendment was not intended to abrogate the common law * * * neither was it meant, on the other hand, to exclude everything which was not a part of the common law or established by immemorial usage. The legislature of a state is not prohibited from changing or abolishing the common law, nor is it deprived of the power to devise new remedies or processes or to adapt them to the changing conditions of business and society. That which the constitutional provision is designed to perpetuate is not remedies or forms of procedure, but the established and fundamental principles of private right and distributive justice."[26]

In judicial proceedings due process of law implies a regular proceeding before a competent court possessing jurisdiction, with an opportunity to the party to appear and be heard in his own defense or in rebuttal of the claim made against his property. In criminal prosecutions, the requirement of due process of law is satisfied where there is a lawful arrest, sufficient notice of a valid accusation and an adequate opportunity to defend in a court having jurisdiction.

Laws Impairing the Obligation of Contracts

The Constitution of the United States prohibits the States from passing any law "impairing the obligation of contracts," [27] and similar prohibitions are contained in the constitutions of many of the states. This provision applies, "not only to the ordinary statutes of the state, and the ordinances of its municipalities, but also to any clause in its constitution, or any amendment thereto, which produces the forbidden effect. But decisions of the courts are not in this sense 'laws.' "[28]

The "contracts" secured by this clause are "all such as might be injuriously affected by the legislative action of the state if not thus protected. State legislatures are thus prohibited from impairing the obligations of—(a) Agreements or compacts of the state with another state. (b) Contracts of the state with corporations or individuals. (c) Grants of property or franchises

[26] Black, p. 592.

[27] Art. 1, § 10, cl. 1, U.S.C.A.Const.

[28] Black, § 272, p. 709.

by the state. (d) Contracts between private persons. The contracts thus protected from impairment by the constitution do not include—(a) Statutory grants of mere licenses or exemptions. (b) The tenure of public offices. (c) Illegal or immoral contracts. (d) Judgments of the courts. (e) The status created by marriage."[29]

A law is contrary to this provision and is void if it: "(a) Precludes a recovery for breach of the contract. (b) Excuses one of the parties from performing it. (c) Renders the contract invalid. (d) Puts new terms into the contract. (e) Enlarges or abridges the intention of the parties. (f) Postpones or accelerates the time for performance of the contract. (g) Interposes such obstacles to its enforcement as practically to annul it."[30]

The obligation of a contract "is that duty of performing the contract, according to its terms and intent, which the law recognizes and enforces,"[31] and is distinct from the remedy for its enforcement. "Whatever pertains merely to the remedy may be changed or modified, at the discretion of the legislature, without impairing the obligation of the contract, provided the remedy be not wholly taken away nor so hampered or reduced in effectiveness as to render the contract practically incapable of enforcement."[32]

Interpretation of Constitutions

The judicial department of the government is the final and authoritative interpreter of the constitution. "Even though a statute may be in violation of a provision of the Constitution, it is not void, but only voidable at the instance of some person whom it affects injuriously. And it does not belong to any officer of the executive department of the government, nor to any administrative board or commission, to declare an act of the legislature unconstitutional. On the contrary, it is the duty of all public officers to obey a duly enacted statute, however repugnant to the Constitution, until some one whose rights it invades calls in the aid of the judicial power to pronounce it void. But as the Constitution is a law, and questions concerning its scope and interpretation, and of the conformity of public and private acts to its behests, are questions of law, the ultimate determination of such questions must belong to the department which is charged with the function of ascertaining and applying the law. And

[29] Black, §§ 275–277, p. 714.

[30] Black, § 274, p. 711.

[31] Black, § 273, p. 711.

[32] Black, § 283, p. 736.

as the courts have the power to enforce their judgments, their determination of such questions is final; and as their decisions are entitled to respect and obedience as precedents, their expositions of the Constitution are authoritative and binding."[33]

It is the business of the courts to interpret and apply the law to cases brought before them. "In so doing, they must determine what is the law applicable to a particular case. A statute which, if valid, will govern the case, is presumptively the law for its decision. But a statute is the expressed will of the legislature, while the Constitution is the expressed will of the people. The latter is paramount. If the statute conflicts with it, [the statute] is invalid. * * * When this question of unconstitutional legislative action is raised, in such a manner as to become necessary to the determination of the pending cause, the court must decide it; and if it shall find that the statute is in violation of the Constitution, and therefore not law, it must so declare, and decide the case accordingly. This is the whole rationale of the power of the courts to adjudge statutes invalid."[34]

A question of the constitutionality of legislation will not be decided unless it is imperatively necessary to the right disposition of the case and, "unconstitutionality will be avoided, if possible, by putting such a construction on the statute as will make it conform to the Constitution."[35] Every presumption is in favor of the constitutionality of a legislative act, and a statute cannot be declared void on considerations going merely to its policy, propriety, wisdom, or expediency. Where part of a statute is unconstitutional, and the remainder is valid, the good and bad parts will be separated, if possible, and that which is constitutional will be sustained. A decision against the constitutionality of a statute, rendered by a competent court in a proper case, leaves the statute entirely void and inoperative.

Rules of Construction

The principal rules of construction employed in the interpretation and application of constitutions are as follows: (1) A constitution is not to be interpreted on narrow or technical principles, but liberally and on broad, general lines, in order that it may accomplish the objects of its establishment and carry out the principles of government. (2) A constitution must be so construed as to give effect to the intention of the people who

[33] Black, p. 54.

[34] Black, p. 55.

[35] Black, § 41, p. 68.

adopted it, this intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it except in cases where that assumption would lead to absurdity, ambiguity, or contradiction. (3) A constitution should be construed uniformly. (4) Every part of a constitution should be given effect if possible; and to this end the whole should be examined to determine the meaning of any part and the construction should be such as not to raise any conflict between different parts which can be avoided. (5) A constitution and its successive amendments should be read together as a single enactment, the amendments making no further change than is necessary. (6) A constitution should be construed with reference to, but not overruled by, the doctrines of the common law, especially as to words and phrases familiar to the common law and which have received judicial interpretation. (7) Retrospective operation should not be given to a constitutional provision unless imperatively required by its language. (8) The provisions of a constitution, unless the contrary is plainly indicated, are to be taken as mandatory and not as merely directory. (9) whatever is necessary to render effective any provision of a constitution, whether the same be a prohibition or restriction or the grant of a power, must be deemed implied and intended in the provision itself. (10) Where a constitutional provision confers a power or enjoins a duty, it is to be taken as conferring by implication all powers necessary for the exercise of the power, or performance of the duty enjoined. (11) The words employed in a constitution are to be taken in their natural and popular sense unless they are legal or technical terms in which case they are to be taken in their technical sense. (12) If a constitutional provision is plain and free from ambiguity it must be taken to mean what it says and no considerations of resulting hardship can avail to alter its meaning. (13) A constitutional provision should not receive a construction which would lead to absurdity, unreason or ineffectiveness if any reasonable construction is open. (14) If a constitutional provision which has received a settled judicial construction is adopted in the same words by the framers of another constitution it will be presumed that the construction of the former was likewise adopted. The stare decisis doctrine applies "with special force to the construction of constitutions, and an interpretation once deliberately put upon the provisions of such an instrument should not be departed from without grave reasons."[36]

[36] Black, § 69, p. 90.

TAXATION

57. The power to tax is an inherent attribute of sovereignty and is unlimited in theory, but in the United States this power is subject to various constitutional limitations.

Taxes have been defined as "ratable burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."[37] What taxes shall be laid, in what amounts, and upon what persons or objects are matters for the legislative department of government, and the courts are not concerned with the wisdom, expediency, or economic policy of a tax law provided such law infringes no constitutional limitation.

In the United States "the necessary independence of the federal and state governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in the exercise of those powers and functions."[38]

The power of taxation possessed by the several states is limited in certain particulars by specific provisions in the federal constitution, and a state legislature may be further circumscribed in the exercise of such power by various limitations in the state constitution. "Whatever these restrictions may be, in the particular state, they must be strictly observed. But an intention to limit the power of taxation will never be presumed; it must be shown to follow from clear and definite provisions of the constitution."[39]

The constitutions of many of the states require taxation to be equal and uniform, but such a provision usually applies only to taxes on property and "does not prevent a reasonable and proper classification of persons or property, nor the granting of such exemptions as are usual. It requires uniformity in the rule or method of assessment. Violation of this requirement, if gross and palpable, will justify the courts in giving relief."[40]

The "equal protection" clause of the Fourteenth Amendment to the federal constitution "does not prevent a state from adjust-

[37] Black, § 170, p. 429.

[38] Black, § 172, p. 432.

[39] Black, § 174, p. 439.

[40] Black, § 176, p. 446.

ing and changing its tax laws in all proper and reasonable ways; it does not require equality in the levying of taxes, nor prevent the legislature from classifying the different persons or subjects of taxation and imposing different rates, or granting exemptions, provided the tax levied on each class is equal and uniform as to that class. But there must be no arbitrary discriminations."[41] On the other hand, the constitutional requirement of "due process of law" prohibits a state from enforcing payment of taxes illegally levied. "And even in the case of a valid tax, it is necessary that the taxpayer, at some stage of the proceedings, should be accorded due and sufficient notice of the liability sought to be imposed upon him and a fair and sufficient opportunity to contest the validity, rate, manner, or amount of the assessment on his property before a court, officer, or board having authority to give him relief."[42]

Distinct from the general power of taxation is the power of a state to impose burdens in the nature of taxes upon special occupations or special kinds of property for the purpose of regulation rather than for revenue. Such regulatory impositions are exercises of the police power, not the power to tax. Hence, "license fees, occupation taxes, inspection fees, and other like exactions, which are not imposed for the purpose of raising revenue, but for the proper regulation of matters deemed essential to the public safety, health, or welfare, are not 'taxes' in the ordinary and proper sense of that term, and are not governed by the constitutional rules and maxims applicable to taxation, but by those which define and limit the exercise of the police power."[43]

POLICE POWER

58. The police power of a state is the inherent authority under which its legislature may, within constitutional limits, prescribe laws and regulations to safeguard the safety, health and morals of the public, prevent fraud and oppression, and promote the public convenience, prosperity and the general welfare.

In the United States, the power and authority to make police regulations is vested: "(a) In the legislatures of the several states, to a plenary degree, subject only to the paramount authority of positive constitutional prohibitions. (b) In Congress,

41 Black, § 229, p. 586.
42 Black, § 232, p. 604.
43 Black, p. 454.

to a limited extent and for special purposes. (c) In the authorities of municipal corporations, in a subordinate and delegated manner."[44]

In the exercise of the powers expressly granted to it, and within the scope of its supreme authority, Congress has the right to enact measures relating to the public police of the nation but it has no general power to make police regulations for the people of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states under the guise of police regulation, such authority being denied to the federal government and reserved to the states by the Tenth Amendment of the federal constitution.

Subject to the authority of Congress acting within the sphere of its powers and subject to any restrictions imposed by the federal constitution and that of the particular state, the legislature of each state has full power to enact police regulations. Thus, "regulations enacted under the police power must not violate any provision of the federal or state constitutions, or interfere with the exclusive jurisdiction of Congress, or unlawfully discriminate against individuals or classes, or unreasonably or unnecessarily invade private rights of liberty or property. They must actually relate to some one or more of the objects for the preservation of which this power may be exercised, and be proper and adapted to that purpose, and directed against a real evil, actual or threatened." [45]

44 Black, § 166, p. 370.
45 Black, § 168, p. 421.

CHAPTER 12

CRIMINAL LAW

IN GENERAL

59. A crime is the commission or omission of an act which the law forbids or commands under pain of punishment imposed by the state.

The elements of crime are so variable that it is impossible to give any succinct definition which will be correct both inclusively and exclusively, and in the United States, as each state is an independent unit in the making and enforcing of criminal law, the laws of the particular state must be examined to determine the criminal character of any act.[1]

The substantive criminal law "is much narrower in scope than the broad concept of 'The Administration of Criminal Justice.' The latter includes also the following subjects: Criminal procedure, police organization and administration, prosecution, accusation, the defense of accused persons, the organization of courts, pleadings, arraignment and trial, evidence, judgment and sentence, appeals, probation, parole, pardon, penology and prison administration, juvenile courts, special procedures for crime prevention and laws designed to change social and industrial conditions in order to prevent crime. The federal government also has an elaborate system of administration of criminal justice." [2]

[1] "It is often loosely said that a particular act is a crime, and that there should be a law against it, but an act is not a crime merely because it is wrong. In the absence of prohibition by the law, no act is a crime, however wrong it may seem to the individual conscience. Thus it has been decided [U. S. v. Ramsay, Hempst. 481, Fed.Cas.No.16,115] that the federal court could not punish one who procured another to commit murder, in the absence of an act of Congress making such procuring a crime, although, as said by the court, the person who instigates another to commit murder is frequently guilty of a greater moral wrong than the one who strikes the fatal blow. Furthermore, the law which prohibits the crime must be in force, not only when the act is committed, but when it is punished." Miller on Criminal Law, (hereinafter cited "Miller"), p. 19.

[2] Miller, § 1, p. 1.

Crimes and Torts Distinguished

A crime is to be distinguished from a tort, the former being a public wrong, the latter a private wrong. "Most wrongful acts constitute, in each case, both a crime and a tort, subjecting the doer to punishment at the hand of the state and rendering him liable to pecuniary damages in a civil suit by the individual immediately injured. The two proceedings are distinct, however, and have a different object, the one being to punish, while the other is to obtain redress for the injury. Neither proceeding is a bar to the other. The fact, therefore, that one has been held liable for damages in a civil action by an individual, is no defense when he is criminally prosecuted by the state." [3]

Generally, the character of an act as a crime or tort depends on whether the good of the state is best subserved by denouncing it as an offense and annexing a penalty to the act, and providing for prosecution by the state, or by leaving it to the individual to seek redress in damages in a private action for the injury suffered. "What wrongs are sufficiently injurious to the public to be classed as crimes is a question upon which there has been a wide divergence of opinion. Many crimes known to the common law have disappeared from present day classifications, and many wrongs which are today deemed public wrongs were unknown to the common law or were treated by it only as private wrongs, and cognizable only by the civil courts." [4]

Crimes Mala In Se and Mala Prohibita

A distinction obtains between crimes which are mala in se, or wrongful from their nature and punishable at common law, such as murder, robbery, rape, and many lesser offenses, and those that are mala quia prohibita, or wrong merely because prohibited by statute. "The distinction is a very indefinite one. Even in England some of the more serious offenses came into the law through legislative action; for example, embezzlement, conspiracy and assaults with intent to commit various unlawful acts. The distinction is even less real in the United States where the definition and declaration of crimes has become more and more a matter of legislation. In some states no act is a crime unless prohibited by statute. Nevertheless in all jurisdictions, the distinction is still important in determining the presence or absence of required criminal intent." [5]

[3] Miller, p. 21.

[4] Miller, p. 20.

[5] Miller, p. 23.

Moral Turpitude

A distinction is also made between crimes which involve "moral turpitude," and those which do not. Such a crime has been defined as, "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man." [6] The presence or absence of moral turpitude becomes important "in certain special proceedings such as disbarment of attorneys, deportation of aliens, revocation of physicians' licenses, in cases involving the credibility of witnesses, in cases of defamation involving the imputation of crime, and in cases in which conviction of a crime involving moral turpitude, is made ground for divorce." [7]

Infamous Crimes

Still another classification is that of "infamous crimes." At common law, an infamous crime was one "the commission of which was inconsistent with the common principles of honesty and humanity. Infamous crimes were treason, felony, all offenses founded in fraud and which came within the general notion of the crimen falsi [8] of the civil law, piracy, swindling, cheating, barratry, and the bribing of a witness to absent himself from a trial, in order to get rid of his evidence. Within the meaning of the phrase as used in the United States Constitution,[9] a crime is infamous if it be punishable by imprisonment accompanied by hard labor. In some states the rule is that infamy may be determined either by the nature of the crime, as at common law, or by the nature of the punishment which may be inflicted, as in the federal cases. At common law the question was of importance largely in determining the competency of a witness. At the present time this is a matter of less importance; but both under the Federal Constitution and the Constitutions and statutes of the various states other considerations of procedure as

6 Black's Law Dictionary, 3d Ed., p. 1765.

7 Miller, pp. 24, 25.

8 (This term, borrowed from the civil law, is used to describe the class of crimes which involves falsification; that is, crimes such as forgery, perjury, and the like.)

9 Am. 5, U.S.C.A.Const., which provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

well as civil disqualification make the definition still important." [10]

Sources

The most important source of criminal law in the United States is the common law of England, but there are no common-law crimes against the United States. "In the earlier decisions it was held that the federal courts had jurisdiction of common-law offenses against the United States on the theory that the exercise of such a power was necessary for the preservation of established government. Later cases, however, definitely established the rule that there are no common-law offenses against the United States and that a statutory authority must exist for declaring any act or omission a criminal offense. It is equally true that the statute must provide punishment, and a failure to do so results in the discharge of a person accused thereunder. However, it has been decided that when Congress has by statute referred to or adopted a common-law offense, without further definition, the common-law definition must be followed." [11]

The criminal law of the several states is either prescribed by their constitutions and statutes or is founded on the common law of England. In the states which have expressly adopted English common law by constitutional or statutory provision the common law has been widely altered by statute. Nevertheless it is frequently stated in such states that except as it has been altered by statute the English common law is their law so far as applicable to local, present conditions. "On the other hand, it is expressly provided by statute in a number of states that no act or omission is criminal or punishable, except as prescribed or authorized by code or statute. In a few states it is required that the crime to be punishable must be defined by the statute. Generally it is held to be sufficient that the crime be declared by statute and that the common law may be looked to for the definition thereof as well as for construing the statute." [12]

10 Miller, pp. 25, 26.

11 Miller, pp. 29, 30.

12 Miller, pp. 31, 32.

ELEMENTS

60. A common-law crime consists of two elements:

(a) The criminal act or omission, and

(b) The criminal intent or state of mind of the actor required by the definition of the particular crime to exist in concurrence with the act.

Intent

It is a general principle of the common law that a crime is not committed "if the mind of the person doing the act in question is innocent. * * * Hence it is said that every crime, at least at common law, consists of two elements, the criminal act or omission and the mental element commonly called 'criminal intent' or 'mens rea.'" [13] Generally, when a person capable of entertaining criminal intent and acting without justification or excuse commits an act prohibited as a crime his intention to commit the act constitutes criminal intent and in such a case the existence of criminal intent is presumed from the commission of the act on the theory that a person is presumed to intend his voluntary acts and their natural and probable consequences. However, when a crime consists not merely in doing an act but also in doing it with a specific intent, the existence of such intent is an essential element of the offense and is not presumed from the commission of the act. Such intent must be proved. Another technical distinction of mental state is that designated as "constructive intent" which applies where a person engaged in an unlawful act commits another unlawful act he did not intend to commit. Under the doctrine of constructive intent, the intent to commit the first act is carried over to the act actually committed. Generally, this doctrine is applied only in situations where the first act is malum in se. It is sufficient in cases which require only general intent but has no application in cases that require a specific intent.

The various classes of intent known to the common law have been reenacted in statutes, and "the statutes have also made wide use of such words as 'malice,' 'willfully,' 'wantonly,' 'knowingly,' and 'negligently,' and have also created large numbers of offenses in which no intent at all is required." [14]

[13] Miller, pp. 52, 53.

[14] Miller, § 20, p. 68.

Act

The act which an offense requires varies with each crime. "In some cases it is a physical or muscular movement or performance; in others it is an omission to act. Sometimes it involves passive participation in the muscular act of another, and again it involves such conduct as 'possessing' or 'belonging.'. Sometimes the defendant's act is criminal or not, depending on the existence of some status or relationship such as marriage." [15] To constitute a crime "act and intent must concur, except in the case of crimes which do not require intent." [16]

Capacity

To be liable for a crime the actor must have had the capacity to possess the required intent at the time of his act, consequently persons with insufficient mental capacity to entertain criminal intent are not responsible or liable for their criminal acts. Thus, at common law, "the rule was that a child under 7 was incapable of committing crime; as to a child between 7 and 14 there was a rebuttable presumption of incapacity; after 14 there was a rebuttable presumption of capacity. Under the statutes the common-law rule has been followed generally, except that the age classifications have been slightly altered in some of them. In practically all states juvenile courts have been established and a theory of juvenile delinquency substituted for criminal responsibility. To a large extent, but not entirely, this has displaced the common law ideas of criminal responsibility of children." [17]

In criminal law "insanity is any permanent defect or disease of the mind which renders a person incapable of entertaining a criminal intent, [and] incapacity to entertain a criminal intent renders one criminally irresponsible for his acts committed while so incapacitated." [18] However, insanity is a form of mental incapacity which may be urged as existing at the time of arraignment or trial, to prevent going to trial, and which may be

[15] Miller, § 22, p. 77.

[16] Miller, § 21, p. 73.

"Some causal relationship must exist between defendant's act or the act of another in his behalf, and the prohibited result which constitutes the crime. This causal relationship is said to exist when his act was the proximate cause of the injury. To be proximate, defendant's act need be only a contributing cause, as in the case of concurrent acts of two persons acting with a common design, or in some instances if they be concurrent, but independent of each other." Miller, § 23, p. 82.

[17] Miller, § 34, p. 119.

[18] Miller, § 36, p. 125.

urged as existing at the time of sentencing, to prevent the imposition of sentence, as well as an incapacity which may be urged as existing at the time the alleged crime was committed to prevent a finding of criminal liability therefor. [19]

In regard to intoxication and capacity for crime: "voluntary drunkenness furnishes no ground of exemption from criminal responsibility or limitation thereof, except (a) where drunkenness has produced insanity, in which case the exemption is based on insanity, not on drunkenness; (b) where a specific intent is essential to constitute the crime, in which case the fact of intoxication may negative its existence; (c) where the fact of intoxication may show provocation, in which case the degree of the offense may be rendered less thereby." [20]

Concerning married women and their capacity for crime: "the common-law rule is that if a married woman, in the presence of her husband, commits an act which would be a crime under other circumstances, she is presumed to have acted under her husband's coercion and such coercion excuses her act; but this presumption may be rebutted if the circumstances show that in fact she was not coerced. The present tendency in the United States is to abrogate this rule." [21] This rule of the common law is also subject to exceptions "in case of treason, murder, probably robbery, and of those crimes which are from their nature generally committed by women." [22]

Corporations have been regarded as incapable of crime. However, the incapacity of corporations to commit crimes is not mental in character, but is rather the result of their peculiar legal status which makes difficult the application to them of the concept of moral, personal responsibility which still pervades large sections of the criminal law. "Originally corporations were completely exempt from criminal responsibility. Gradually the law recognized their liability in cases of nonfeasance and later in many cases of misfeasance. Most jurisdictions stop at this point, but a few have gone so far as to hold corporations criminally liable in cases involving personal violence and particular types of criminal intent." [23]

In the United States, ambassadors and other diplomatic agents of foreign governments are exempt from criminal responsibility. "In this case, of course, the incapacity is caused in no way by

19 See Miller, § 35, p. 122.
20 Miller, § 42, p. 137.
21 Miller, § 44, p. 142.
22 Miller, § 44, p. 142.
23 Miller, § 45, p. 144.

mental disability, but solely by way of an exemption of law created because of the international problem which is involved, and the immunity is regarded not so much as one enjoyed by the diplomatic agent himself as by the government which he represents." [24]

SPECIFIC CRIMES

61. Crimes are divided into:

(a) Treason,

(b) Felonies, and

(c) Misdemeanors.

And for definitive purposes are classified as being against:

(a) The person,

(b) The habitation,

(c) Property,

(d) The public health, safety, comfort, and morals,

(e) Public justice and authority,

(f) Public peace,

(g) The existence of government, and

(h) The law of nations.

Treason

Crimes at common law are divided into treason, felonies, and misdemeanors and the statutes have generally followed the same division. "Under the old English common law, treason was divided into high and petit treason, the former consisting in certain acts against the sovereign, and the latter in the murder of a superior by an inferior; that is, of a husband by his wife, a master by his servant, or a lord or ordinary by an inferior ecclesiastic. There is no longer such a crime as petit treason, the offense being regarded simply as homicide." [25]

In the United States the crime of treason is defined by the federal constitution,[26] which declares: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." This

24 Miller, pp. 150, 151.
25 Miller, p. 41.
26 Art. 3, § 3, U.S.C.A.Const.

section also provides: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court," and that, "The Congress shall have Power to declare the Punishment of Treason."

Felony

A felony is an offense which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods, or both, or which a statute expressly declares to be such. "In some states the statutes expressly declare all crimes to be felonies which are punishable by death or by imprisonment in the state prison." [27]

Misdemeanor

Misdemeanors, generally, include all crimes which are less than felonies. "Crimes of lesser importance than felonies were originally called trespasses, but later came to be known as misdemeanors." [28] Such offenses are frequently defined as including all crimes not punishable either by death or imprisonment in the state prison.

Crimes Against the Person

Crimes against the person include felonious homicide which is the killing of a human being by a human being without justification or excuse. It may be either murder or manslaughter. Murder is the unlawful killing of one human being by another with malice aforethought. [29] At common law there are no degrees of murder, but most of the states have by statute divided the crime into two degrees and some into three. "First degree murder is usually defined in terms of premeditation and deliberation, in addition to malice. However, it is also defined as a felonious killing while committing or attempting to commit another felony, or by lying in wait, or by poisoning, or by the use of torture or great cruelty. In some states first degree murder requires the existence of express malice in the mind of the accused while implied malice is sufficient for second degree murder. Second degree murder is also defined as a killing committed without deliberation or premeditation, or while committing a non-capital felony, or in killing another with a deadly weapon or with intent to do mere bodily harm." [30]

[27] Miller, p. 41.

[28] Miller, p. 45.

[29] "Malice aforethought does not necessarily mean an actual intention to kill the deceased, nor does it necessarily imply deliberation, but denotes purpose and design as contrasted with accident and mischance. It is present when there is an intention to cause death or grievous bodily harm, or knowledge that one's acts will probably so result, when committed in the commission of a felony or in obstructing an officer who is making an arrest or preventing a riot." Miller, § 88, p. 263.

Manslaughter is the unlawful killing of one human being by another without malice aforethought. For example, killing on a sudden quarrel or in a transport of passion may be manslaughter, as may also an inadvertent killing occurring in the commission of an unlawful act. Manslaughter is either "voluntary," or "involuntary." Voluntary manslaughter is "an intentional killing without malice. It occurs when the homicide is committed in sudden mutual combat and when committed in passion and hot blood induced by great provocation. Such provocation must result from acts and conduct of the deceased and is ineffective to reduce the homicide from murder to manslaughter if induced or sought for by the defendant. Both great provocation and great passion must be present and must concur at the time of the homicide. If reasonable time for cooling and for the return of reasoned judgment elapses before the killing then it is murder." [31] Involuntary manslaughter, on the other hand, "is homicide unintentionally caused and without malice, resulting from the commission of an unlawful act not amounting to a felony, or from negligence, or lack of caution, or absence of skill in the commission of a lawful act, or from failure to perform a legal duty." [32]

Mayhem consists of the violent infliction of injury upon a person, rendering him less able to fight, annoy his enemy, or defend himself. "In the early development of the law of mayhem, mere disfigurement did not constitute the crime, but this was added by statute and has been generally adopted in the United States also. At common law, mayhem was a misdemeanor except in case of castration. It is a felony in most of the United States." [33]

Rape is the act of having unlawful carnal knowledge of a woman by force and against her will. "Force may be actual or constructive, as where acquiescence is secured by fear or intimidation, or in some cases by fraud. Absence of consent may be actual or it may be constructive, as where the woman is legally incapable of consent, by reason of insanity, imbecility, or infancy.

[30] Miller, § 90, p. 273. The crime of manslaughter is divided into different degrees in different states.

[31] Miller, § 92, p. 279.

[32] Miller, § 93, p. 285.

[33] Miller, § 95, p. 290.

The act of having carnal knowledge is now held to have occurred where the slightest penetration takes place, though it was formerly held that an emission must occur." [34]

A common or simple assault is an attempt or offer, with force or violence, to do a corporal hurt to another. "The attempt or offer must consist of an actual overt act, mere words or preparations being insufficient. The cases are not in accord as to the intent necessary for assault, but the better rule is that a general criminal intent is sufficient." [35] Distinct from "simple" assaults are "aggravated" assaults, the latter being "those which are accompanied by circumstances of aggravation, such as assault with intent to kill, to rape, or to commit other serious crimes against the person. Statutes in the various states define aggravated assaults according to particular requirements therein set forth." [36] A battery, on the other hand, "is an assault, whereby any force, however slight, is actually applied to the person of another, directly or indirectly. A general criminal intent is sufficient in battery and may be found from circumstances of negligence and constructive intent." [37]

False imprisonment is any unlawful restraint of a person's liberty and is committed "whenever a person detains the body of another, by force actual or constructive, without his consent and without legal cause. False imprisonment is a misdemeanor at common law and generally under the statutes." [38]

The crime of kidnapping "is a false imprisonment aggravated by conveying the person imprisoned to another place. In some states a false imprisonment accompanied by a mere intent so to convey is sufficient to constitute the crime." [39] It is a misdemeanor at common law, but has been made a felony, generally, by statutes.

The crime of abduction is generally defined as the taking of a female without her consent, or without the consent of her parents or guardian, for the purpose of marriage or prostitution. "It was probably not a crime at early common law, but was defined by a statute enacted in 1488. [3 Hen. VII, c. 2.] The statutes of the various states follow the language of this old statute generally, but differ widely as to details. It is a felony in most jurisdictions." [40]

[34] Miller, § 96, p. 293.

"Rape was originally a felony under the old common law. It was made a misdemeanor by an early statute and then again changed to a felony. It is a felony in practically all of the United States." Miller, § 97, p. 301.

[35] Miller, § 98, p. 302.

[36] Miller, § 100, p. 309.

[37] Miller, § 101, p. 312.

[38] Miller, § 102, p. 315.

[39] Miller, § 103, p. 316.

Crimes Against the Habitation

Crimes against the habitation include arson, which is a felony at common law and which consists in the willful and malicious burning of the dwelling house of another. To constitute the crime at common law: "(a) There must be some burning, though it may be slight. (b) It must be a dwelling house, or outhouse used in connection therewith. (c) The house must belong to another or be occupied by another. (d) The burning must be done or caused maliciously." [41]

Burglary, at common law, is the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony therein. To constitute the crime: "(a) There must be an actual or constructive breaking, and (b) An entry. (c) The house broken and entered must be a dwelling house. An outhouse within the curtilage is regarded as part of the dwelling house. (d) The dwelling house must be that of one other than the accused. (e) Both the breaking and entry must be in the nighttime. (f) And both must be with the intent to commit a felony in the house." [42]

Crimes Against Property

Crimes against property include larceny, which, at common law, "is the obtaining of possession of personal property, by trespass in the taking and carrying away of the same, from the possession of another, and with the felonious intent to deprive him of his ownership therein"; [43] and, at common law, larceny was divided into simple larceny and compound larceny. "Simple larceny was subdivided into grand and petit larceny. Compound larceny consisted of simple larceny accompanied by circumstances of aggravation. The distinction between grand and petit larceny was abolished in England but persists generally in the United States. Some compound larcenies are treated as such; others are defined

[40] Miller, § 104, p. 319.

[41] Miller, § 106, p. 323.

The statutory definitions of arson vary in the different states of the Union.

[42] Miller, § 108, p. 330.

The common-law definition of and requirements for burglary have been modified by statutes in various states of the Union.

[43] Miller, § 109, p. 340.

as distinct crimes. Other statutory changes have been made in some jurisdictions."[44]

Embezzlement was not a crime at common law "but is made so by statute, to punish the fraudulent appropriation of property by one lawfully in possession before it has been in the possession of the owner, or by one who has lawfully obtained possession from the owner, and who in neither case is guilty of larceny, because there is no taking from the owner's possession by an act of trespass."[45]

A cheat, at common law, is the fraudulent obtaining of another's property by means of some false symbol or token, such as, when not false, is commonly accepted by the public for what it purports to represent. The symbol, token, device, or practice must be such that common prudence cannot guard against it. "Among the various false symbols and tokens are false measures, false weights, false marks of weight, false stamps, counterfeit orders, seals, dies, marked cards, etc. The statutory development of this crime has proceeded in two directions. The first may be seen in the elaborate development of laws regulating weights, measures, and containers used in trade and commerce. In some states, departments of weights and measures have been set up and given wide powers of administration, to anticipate and to prevent, so far as possible, the misuse of such articles, as cannot be easily guarded against by the use of common prudence."[46]

The second division of statutory development of this crime has produced the offense of cheating, or obtaining property by false pretenses. Although not amounting to a common-law cheat, and although not a crime at common law, obtaining property by false pretenses is generally made a crime by statute and is defined as "knowingly and designedly obtaining the property of another by false pretenses, with intent to defraud."[47]

44 Miller, § 115, p. 370.

45 Miller, § 116, p. 374.

46 Miller, pp. 381, 382.

47 Miller, § 118, p. 382.

"Most of the states have, by statute, created a number of offenses, having the common element of cheating or using fraudulent devices, as, for example, false personation of others or of officers; production of false heirs; fraudulent issue of documents, and sale of stock; and many others. One of the most important of these statutory offenses is that of making and uttering a check with intent to defraud, and without sufficient funds in the drawee bank, or with no account there at all. This is, of course, a form of obtaining money or goods under false pretenses; i. e., in this case, that the accused has on deposit an amount sufficient to secure the payment of the check in full. Therefore, if the check is postdated, it is usually held to be a mere promise to pay in the future and hence not within the terms of the statute." Miller, pp. 390, 391.

Robbery, a felony at common law, is both a crime against property and a crime against the person. It consists of the taking of the personal property of another, from his person or in his presence, by violence or intimidation, against his will, and with intent to steal. To constitute the crime of robbery: "(a) The property must be such as may be the subject of larceny. (b) It must be taken and carried away, as in case of larceny. (c) It must be taken from another's person, or in his presence, and against his will. (d) It must be so taken by violence or by putting in fear. (e) It must be taken with intent to steal."[48]

The receiving of stolen goods is perhaps a substantive misdemeanor at common law, but this is doubtful. However, it is very generally made a crime by statute. To constitute the crime: "(a) The property must have been stolen, and must retain such character when received. (b) It must be taken into the possession, though not necessarily manual possession, of the receiver, with the consent of the person from whom it is received. (c) The receiver must know that it was stolen. (d) The receiver must have felonious intent."[49]

The crime of malicious mischief requires that property belonging to some one other than the accused be destroyed or injured by him with malice. "In some jurisdictions the malice must be against the owner of the property. The accused may escape liability by proving lack of malice or that he acted in good faith, under an honest claim of right."[50]

Forgery, a misdemeanor at common law, is the fraudulent making or altering of a writing to the prejudice of the rights of another. To constitute the crime: "(a) There must be a false making or alteration; (b) Of a writing or document, which, as made or altered, must be of apparent legal efficacy to impose a liability or to change a liability; (c) The alteration, if it be an alteration, must be material; (d) It must be made or altered with intent to defraud."[51]

48 Miller, § 124, p. 391.

49 Miller, p. 396.

50 Miller, § 128, p. 401.

"Although it is generally asserted to be true, it is doubtful whether malicious mischief was a crime at common law in England. However, it was adopted as a common-law crime in several of the states, and has also been widely extended by statute in both England and the United States." Miller, § 127, p. 400.

51 Miller, § 120, p. 405.

Crimes Against the Public Health, Safety, Comfort, and Morals

This class of crimes includes public or common nuisances; bigamy; adultery; fornication; incest; miscegenation; sodomy; and seduction. "A common or public nuisance, which is a misdemeanor at common law, is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals, of the citizens at large, resulting either (a) From an act not warranted by law, or (b) From neglect of a duty imposed by law."[52]

Bigamy, or polygamy, "became a crime in England, by statute in 1604, [1 Jac. 1, C. 11], and has been declared by statute in all of the United States. It is committed where one, being legally married, marries another person during the life of his or her wife or husband";[53] but the statutes in this country "generally except from their operation a person whose husband or wife has been absent for a certain number of years without being known by such person to be living within that time."[54]

Adultery has been recognized by some courts as a common-law misdemeanor, but others have held that it is not a crime unless made so by statute. The definitions of the crime vary. Thus, "(a) In some states it is voluntary sexual intercourse between persons one of whom is lawfully married to another, both parties being guilty. (b) In other states it is such intercourse by a married person with one who is not his or her wife or husband, the married person only being guilty. (c) In other states it is such intercourse with a married woman by one not her husband, both parties being guilty."[55]

Fornication is "voluntary unlawful sexual intercourse, under circumstances not constituting adultery; a single act of fornication is not a crime at common law but is made so in some states by statute."[56]

The common law does not punish acts of adultery or fornication committed privately but it does punish those who commit

"To utter a forged instrument is to offer it, directly or indirectly, by words or actions, as good. This, if done with intent to defraud, and with knowledge of the falsity of the instrument, being an attempt to cheat, is a misdemeanor at common law. * * * Uttering and forgery are not different degrees of the same offense, but are distinct offenses, although in some states by statute uttering is declared to be forgery." Miller, pp. 413, 414.

52 Miller, § 132, p. 415.

53 Miller, § 133, p. 423.

54 Miller, § 134, p. 427.

55 Miller, § 136, p. 428.

56 Miller, § 137, p. 432.

such acts openly and notoriously. "For a man and woman illicitly to cohabit together, openly and notoriously, or for a person to be guilty of any open and notorious lewdness and indecency, is a crime at common law, as it constitutes a public scandal and nuisance."[57]

Incest, although not a crime at common law, is generally declared so by statute. It is defined as, "illicit sexual intercourse between persons who are related within the degrees of consanguinity or affinity wherein marriage is prohibited by law."[58]

Miscegenation, or intermarriage between persons of the white and negro races, or the living together of such persons in adultery or fornication, is a statutory crime in some of the states.[59]

Sodomy, or buggery, "is carnal copulation against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with a beast. Bestiality is carnal copulation by a man or woman with a beast."[60]

Seduction is defined as, "the act of a man in enticing an unmarried woman of previous chaste character, by means of persuasion and promises, to have sexual intercourse with him."[61]

To procure an abortion is to cause the miscarriage or premature delivery of a pregnant woman; and to commit such an act after the child has quickened, although with the mother's consent, is a misdemeanor at common law. However, "there are statutes in most of the states making it a felony to procure an abortion, whether the child has quickened or not."[62]

In addition to the common-law crimes and statutory offenses that have been enumerated, "the Congress of the United States has defined a number of crimes which come within this classification; examples of which may be found in laws to prevent interstate traffic in obscene literature, diseased persons, animals or plants, lotteries, white slaves, stolen motor vehicles, intoxicating liquor, and to prevent smuggling into the United States from foreign countries."[63]

57 Miller, § 138, p. 433.

58 Miller, § 139, p. 434.

59 See Miller, § 140, p. 436.

60 Miller, § 141, p. 437.

61 "Seduction is probably not a crime at common law, but it is made so by statute in most of the states." Miller, § 142, p. 438.

62 Miller, § 144, p. 444.

63 Miller, § 145, p. 445.

Crimes Against Public Justice and Authority

This classification includes common barratry, maintenance, and champerty, and the crimes defined in the paragraphs immediately following. Common barratry is the offense of frequently exciting and stirring up suits and quarrels either at law or otherwise; maintenance is the officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party to prosecute or defend it; and, champerty is a bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, the champertor to carry on the party's suit at his own expense. "These three offenses are all old common-law crimes, designed to prevent the stirring up of strife and litigation. Many of the courts have refused to recognize them or have materially restricted the old common-law doctrines. In modern practice these crimes are almost completely disregarded."[64]

Obstructing justice, which consists of resisting or obstructing an officer in the exercise of his duty, is a misdemeanor at common law and by statute in many states.

Embracery, which is "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like,"[65] is a misdemeanor at common law. In some jurisdictions it is defined by statute as one form of bribery.

The crime of escape is committed: "(a) By an officer or other person, having lawful custody of a prisoner, where he voluntarily or negligently allows him to depart from such custody otherwise than in due course of law. (b) By a prisoner, where he voluntarily departs from lawful custody without breach of prison."[66] Prison breach, on the other hand, "is the breaking and going out of his place of confinement by one who is lawfully imprisoned";[67] whereas the crime of rescue "is the forcible delivery of a prisoner from lawful custody by one who knows that he is in custody."[68]

Misprision of felony is a criminal neglect either to prevent a felony from being committed or to bring to justice the offender after its commission; whereas the offense of compounding a crime is the agreeing, for a consideration, not to prosecute a crime which one knows has been committed.

64 Miller, § 152, p. 458.

65 Miller, § 154, p. 463.

66 Miller, § 155, p. 463.

67 Miller, § 156, p. 465.

68 Miller, § 157, p. 466.

Perjury, at common law, "is the willful and corrupt giving, upon a lawful oath, or in any form allowed by law to be substituted for an oath, in a judicial proceeding or course of justice, of false testimony material to the issue or matter of inquiry. Perjury is a misdemeanor. Subornation of perjury is the procuring by one person of another person to commit perjury."[69]

The authorities do not agree in their definitions of bribery at common law. "Some define it as the receiving, by a judge or other officer connected with the administration of justice, of any undue reward to influence his behavior in office. Others define it as the giving or receiving of a reward to influence any official act. The crime has been considerably extended under the statutes and later cases."[70]

The offense of misconduct in office consists of malfeasance, "i. e., the doing of illegal acts under color of office, or abusing discretionary powers; and nonfeasance, i. e., willfully neglecting to perform the duties of office provided by law. Malfeasance may take the form of extortion, oppression, or fraud and breach of trust."[71] However, "refusal to accept an office to which one has been appointed, and the exercise of power and privileges of an office to which one has not been elected or appointed, may also constitute crime."[72]

Criminal contempts are crimes against public justice and authority punishable both by indictment, trial and sentence as in the case of other crimes, and also by summary procedure. "Contempts may occur against other bodies than courts, which exercise judicial powers, but primarily are important as they operate to interfere with or obstruct the orderly administration of justice in courts."[73]

Crimes Against the Public Peace

Any willful and unjustifiable disturbance of the public peace is a crime both at common law and under the statutes. "The offense may consist of disturbing a neighborhood or a number of people assembled in a public meeting, or of disturbing an individual in such a manner or to such an extent as to provoke a breach of the peace."[74] This class includes dueling which is an aggravated assault. However, "one who kills or injures another in a

69 Miller, § 160, p. 468.

70 Miller, § 161, p. 473.

71 Miller, § 162, p. 475.

72 Miller, § 163, p. 477.

73 Miller, § 164, p. 478.

74 Miller, § 165, p. 483.

duel may be guilty of murder, mayhem, or other crime. Challenging another to fight a duel, or bearing or provoking such a challenge, is a misdemeanor."[75] Other crimes of this class are defined in the paragraphs which immediately follow.

The crimes of unlawful assembly, rout, and riot, represent progressive steps in violent mob action. "(a) An unlawful assembly occurs when three or more persons assemble with intent to commit a crime by open force, or with intent to carry out any purpose in such manner as to cause reasonable apprehension of a breach of the peace. (b) A rout is an unlawful assembly which has made a motion toward the execution of the common purpose of the persons assembled. (c) A riot is either an actual beginning of the execution of such an unlawful common purpose, or the execution of an unlawful purpose by an assembly which was lawful when its members first assembled; in each case, force and violence being used, to the terror of the people."[76]

An affray is defined as "the fighting of two or more persons in a public place, to the terror of the people,"[77] and is a misdemeanor.

This class also includes the crime of forcible entry and detainer. "Forcible entry occurs where a person violently enters upon real property occupied by another, with menaces, force, and arms, and without the authority of law. Forcible detainer is detention of the possession of the property by the use of force and violence, and may occur where the original entry was forcible or where it was peaceable."[78]

Criminal libels are also of this class. "The crime of libelling a private person consists in the malicious publication of any writing, sign, picture, effigy, or other representation, tending to expose any person to hatred, contempt, or ridicule. The gist of the offense is its tendency to provoke a breach of the peace."[79] But not all criminal libels are against private persons. "The common law also recognized other libels which are punished as crimes, i. e., blasphemous libels, obscene libels, and seditious libels."[80]

Crimes Against the Existence of Government

The crime of treason falls within this classification, as do such crimes as are defined in the paragraphs which immediately follow. Historically considered, "treason was divided into high and petit treason. The latter is now regarded as felonious homicide. Treason in the English law was wide in scope and arbitrarily applied. It was early limited in scope by statute. In the United States it is even more limited by the Constitution, consisting only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. Treason is also prohibited by the constitutions and statutes of some of the states. Misprision of treason consists in concealing the commission of treason."[81]

In the United States the crimes of espionage and sedition are prohibited by federal statutes against the unlawful obtaining or permitting to be obtained of information affecting national defense; the unlawful disclosing of information affecting national defense; and, seditious or disloyal acts or words in time of war.[82]

The crime of seditious conspiracy is "a conspiracy to overthrow the government by force or otherwise to oppose force to its lawful exercise of authority. An overt act is necessary to constitute the crime."[83]

Counterfeiting is another offense against the government. "The Constitution makes the coinage of money a function of the federal government and gives Congress power to punish persons who counterfeit the money of the United States or attempt, or conspire to do so, or who possess tools, plates, or instruments intended to be used for such purpose. Some of the states also have declared counterfeiting to be a crime. It is also made a crime in some jurisdictions to counterfeit trade-marks or labels."[84]

Abuse of the elective franchise is also a crime against the government. "Illegal voting is a crime at common law, and is also regulated by acts of Congress and by the statutes of the different states. It is also a crime at common law for a person to usurp an office to which he has no claim, or to offer violence to voters. By statutes, betting at elections is made a crime, as are many other acts which violate the purity of elections."[85]

75 Miller, § 166, p. 485.

76 Miller, § 167, p. 486.

77 Miller, § 168, p. 489.

78 Miller, § 169, p. 491.

79 Miller, § 170, p. 492.

80 Miller, § 171, p. 498.

81 Miller, § 172, p. 499.

82 See act of June 15, 1917, c. 30, Title I, §§ 1–3, 40 Stat. 217–219, 50 U.S.C.A. §§ 31–33; and act Mar. 3, 1921, c. 136, 41 Stat. 1359, 50 U.S.C.A. § 33.

83 Miller, § 174, p. 507; and see R. S. § 5336; Mar. 4, 1909, c. 321, § 6, 35 Stat. 1089, 18 U.S.C.A. § 6.

84 Miller, § 175, p. 508.

85 Miller, § 176, p. 508.

Crimes Against the Law of Nations

International law, or the law of nations, is a part of the criminal law of the United States "only to the extent that it is recognized by the Constitution and declared by statute. It is not necessary that Congress should describe the crime as an offense against the law of nations. It is only necessary that the crime be named in the statute and that it be actually known to the law of nations. The following are examples of crimes against the law of nations: Piracy; offenses against representatives of foreign governments; offenses against neutrality; counterfeiting money or securities of a foreign nation."[86]

PURPOSE

62. Crimes are prohibited on the ground of public policy, for the purpose of preventing injury to the public.

"Injury to the public," may include, "destruction or interference with government, human life, private property or other valued institutions or interests. Such considerations as desire for vengeance or uncompensability of injury may also be involved."[87]

The criminal law is sanctioned by capital punishment, imprisonment, and fines, the extent or severity of the punishment being dependent upon the seriousness of the offense.[88] Capital punishment is punishment by death; imprisonment is punishment by confinement in a jail or prison; and a fine is a pecuniary punishment. "Many purposes have been assigned to punishment, such as reformation of the criminal and deterrence of others from the commission of crime. Of course punishment has no purpose except as it works out a larger purpose of the criminal law itself. Perhaps it may be said that whatever purpose is served by punishment is a purpose of criminal law, for example, the compelling of persons to cease or refrain from committing crime, by forcing or persuading them to conform to established rules of conduct designed for the protection of government, of life, of property or of other rights, privileges and immunities guaranteed by law."[89]

86 Miller, § 177, p. 509.

87 Miller, § 3, p. 17.

88 However, the Constitution of the United States, Amendment 8, U.S.C.A., provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

89 Miller, p. 19.

CHAPTER 13

PERSONS AND DOMESTIC RELATIONS

MARRIAGE IN GENERAL

63. The term "marriage" is used in two senses to denote:

(a) The relation of a man and woman legally united as husband and wife, and

(b) The act, as distinguished from the executory agreement to marry, by which the parties enter into the marriage relation.

Marriage, in the sense of the relation of husband and wife, is a status, not a contract; and, in the sense of the act by which the parties become husband and wife, it is the event by which the status of husband and wife is created, not a contract.[1] However, "the relations, duties, obligations, and consequences flowing from the marriage contract are so important to the peace and welfare of society that the Legislature may prescribe who may marry, the age at which they may marry, the procedure and form essential to constitute marriage, the duties and obligations created by

1 "It has frequently been said by courts and even by Legislatures, that marriage is a 'civil contract.' But to conclude from these statements that marriage * * * has all, or even many, of the incidents of an ordinary private contract, would be a grave error. In fact, these statements to the effect that marriage is a 'civil contract' will be found, upon examination, to have been used only for the purpose of expressing the idea that marriage, in the American states, is a civil, and not a religious institution, or that * * * in some states mutual consent alone without formal celebration is sufficient to constitute a valid marriage known as a common law marriage, or that, as is true in all states, the mutual consent of the parties is essential, even in the case of a ceremonial marriage. * * * The fact that marriage is not a contract in the ordinary sense is shown for example by the fact that it is not voidable by

marriage, the effect on the property rights of the parties and the causes which shall be regarded as sufficient for its dissolution."[2]

Essentials of Marriage

To constitute a valid marriage there must be agreement or mutual consent to enter into the marriage relation and such agreement must be real. There may be no real consent either because of mistake, duress, or fraud. Mistake as to the nature and legal consequences of the ceremony, or as to the identity of the other party, renders the marriage voidable; but a marriage is not invalidated by mistake as to the rank, fortune, character, or health of one of the parties.[3] If either party acted under duress, their marriage is voidable. Fraud, to affect the validity of a marriage, must relate to some fact essential to the marital relation. Consequently, "a marriage is not invalidated by false representations or concealment as to rank, or fortune, or as to character, or health, except in extreme situations; nor by false representations or concealment as to chastity, except where the woman was pregnant by another man at the time of the marriage, and the husband was ignorant of the fact, and had not himself had intercourse with her."[4] However, the present tendency of the courts is toward greater liberality in annulling marriages for fraud. Where there has been mistake, duress, or fraud the marriage is voidable, not void; and it can be avoided only by the party mistaken, coerced, or deceived. "By the weight of

an infant, if he be of marriageable age, that it cannot be rescinded or substantially modified by the mutual consent of the parties, that an incapacity to perform the marital duties, if such incapacity develops after the parties are married, does not destroy or permit the rescission of the relation; that the same fraud which would make a contract voidable will not necessarily make a marriage voidable." Madden on Persons and Domestic Relations, (hereinafter cited "Madden") pp. 3, 4.

[2] Wiley v. Wiley, 75 Ind.App. 456, 123 N.E. 252, 1919.

[3] "Whether or not a man and woman will become husband and wife, is entirely for them to decide. Even though there is a perfectly valid engagement, or agreement to marry in the future, the law will not specifically enforce the agreement by decreeing that the unwilling party marry the other, hence in every case it is within the power of either party to refuse to give his consent to the actual marriage. Consequently, unless they both consent, or one of them, not consenting, is estopped from asserting his want of consent, there is no marriage, even though a formal marriage ceremony has been performed." Madden, p. 7.

[4] Madden, § 9, p. 9.

authority, a judicial decree of annulment is necessary, and the mere election of the party to annul is not effective."[5]

In order to effectuate a valid marriage the parties must be capable of intelligently consenting. They may be incapable of intelligently consenting by reason of insanity, intoxication, or nonage. "A marriage is void, in the absence of a statute, if either party, by reason of defect or disease of the mind, was incapable of intelligently consenting. The parties must have been mentally capable of understanding the nature and consequences of marriage. The same rule applies where a party is drunk at the time of the marriage. In most states, by statute, such marriages are declared voidable, and not void; and in some states they are held voidable only, independently of statute."[6] As for their age, "the parties must be of an age at which the law deems them capable of intelligently consenting to enter into the marriage relation. At common law the age of consent is 14 for males, and 12 for females, but in most states the age of consent has been raised by statute."[7] The effect of marriage by infants varies as follows: (a) marriages after the age of consent are binding; (b) marriages between the age of consent and the age of seven years are voidable on or before the age of consent is reached, and by either party, or, after such age is reached, if they have not thereafter cohabited as man and wife or otherwise ratified the marriage; (c) marriages below the age of seven are absolutely void.

The parties to a marriage are also required to be capable in other respects; thus, there must be no impediment of relationship, physical incapacity, civil conditions, or prior marriage. "The parties must not be within the prohibited degrees of kindred, either by consanguinity or affinity. By an early English statute, [32 Hen. VIII, c. 38], there can be no valid marriage within the Levitical degrees; that is, within the third degree of civil reckoning, inclusive, or, in other words, nearer than first cousins. In the absence of statutory provision to the contrary, such marriages are voidable, and not void. The whole subject is now very generally regulated by statutes, defining the limits within which relations may not marry, and frequently declaring marriages within the prohibited degrees absolutely void."[8] Concerning physical requirements, "the parties must be physically capable; but capacity to copulate, not fruitfulness, is the test. The incapacity must exist at the time of the marriage. Neither

[5] Madden, § 10, p. 9.

[6] Madden, § 12, p. 23.

[7] Madden, § 13, p. 28.

[8] Madden, § 15, p. 33.

party can set up his or her own impotence to defeat the marriage. In the absence of statutory provision to the contrary, impotence renders a marriage voidable, and not void."[9] The parties must also meet whatever civil conditions may be imposed by the jurisdiction; for example, many of the states prohibit marriages between negroes, Indians, Mongolians, or some one or more of these races, and white persons. As for the effect of prior marriages of the parties, "in the absence of statutory provision to the contrary, a valid and undissolved prior marriage of either party renders a marriage absolutely void ab initio, even though the parties may have acted in good faith, and in a reasonable belief that the former spouse was dead or divorced."[10]

Power of Legislature to Validate Marriages

Marriage, because of its great social importance, "has always been subject to regulation and control by the state; and it is well settled that the Legislature has power to validate or confirm by statute a marriage theretofore voidable because of some statutory disability or neglect of some statutory requirement."[11]

Formalities in Celebration

Under the common law persons may marry by the mere expression of mutual consent to become husband and wife, but statutes in all of the states set forth formal methods by which marriage may be accomplished.[12] However, if a statute prescribes formalities for the celebration of marriage it is not to be construed as rendering an informal marriage invalid unless it expressly so declares.[13]

9 Madden, § 16, p. 36.

10 Madden, § 18, p. 39.

11 Madden, § 19, p. 47.

12 "Common law marriages may be per verba de praesenti—that is, by consent to live together presently as husband and wife—no copula being necessary. It is sometimes said that there may be a marriage per verba de futuro cum copula—that is, by an agreement to marry in the future, followed by copula in pursuance thereof. But by the better authority a marriage can be effected per verba de futuro cum copula only when the circumstances are such that a present agreement at the time of the copula can be implied." Madden, § 22, p. 48.

13 "Even though a marriage statute is construed to be mandatory, it is not necessary, in order to validly marry, to comply with all its details. In the absence of strict language to the contrary, the ceremony in the presence of the minister or official authorized to celebrate marriages or serving de facto in that capacity is the only absolute requisite." Madden, § 23, p. 64.

Once a marriage is shown to have taken place it is presumed to be valid until the contrary is proved; and, as a rule, the validity of a marriage is determined by the law of the place where it was entered into. However, the latter rule is departed from when such marriage offends a serious public policy of the state where its validity is asserted.

COMMON-LAW INCIDENTS

64. At common law marriage was regarded as making the husband and wife one person.

At common law, the wife's personal property in possession vested exclusively in her husband without any act on his part and on his death passed to his personal representative; and this was true as to personalty owned by her at the time of the marriage, personalty acquired during coverture, personalty in her actual possession, and personalty in the actual possession of some third person not holding adversely.[14] However, "this rule did not apply to the wife's paraphernalia; that is, such articles of wearing apparel, personal ornament, or convenience as were suitable to her rank and condition. These belonged to the husband, like other personalty in possession, but, if undisposed of by him, they belonged to the wife on his death."[15] The husband was also entitled to his wife's choses in action if he reduced them to possession during coverture, but not otherwise.[16]

Under very early statutes, "and perhaps even at common law, the husband was entitled to administer on his wife's estate, for his own benefit. He could, as administrator, recover her choses in action for his own benefit; but he took subject to her obligations contracted dum sola"[17] (while single).

14 "The common law imposed no disabilities whatever upon a woman with reference to her property and contracts merely by reason of her sex. A single woman had exactly the same capacity to her own property and to contract which a man had. It was only by reason of her status as a married woman, which status the law called 'coverture,' that her disabilities arose." Madden, p. 82. And, as the law relating to the capacity of a married woman to own and control property and to contract has been almost completely remade since the beginning of the development of law in the United States, the statements of what the common law was, do not ordinarily represent the law of any state at the present time.

15 Madden, § 28, p. 83.

16 "To reduce them to possession he had to exert some act of ownership over them, with the intention of converting them to his own use." Madden, § 29, p. 85.

17 Madden, § 30, p. 89.

As for the interests in land of the wife, "the husband had, at common law, the enjoyment of his wife's chattels real—leases and terms for years—during his life, with the power to dispose of and incumber them, and they were liable for his debts. If undisposed of on his death, they belonged to the wife. On the wife's death before his they passed to him as administrator in the same way as her choses in action."[18] The husband also acquired, by their marriage, the usufruct of his wife's estates of inheritance during coverture and, when there was issue of the marriage born alive, then for his life as tenant by the curtesy. And he became seised in right of his wife, of her life estates, whether for her own life or for the life of another.

A married woman, at common law, had no capacity to contract and her attempts to do so were absolutely void except in the following cases: (a) she could contract and sue and be sued as a feme sole when her husband had been banished, had abjured the realm, was a nonresident alien, or had been transported; and, (b) in equity she could contract with reference to her equitable separate estate, so as to bind it, but not so as to bind herself personally.[19]

Legislative Reforms; Married Women's Acts

In practically all of the United States "statutes have been enacted providing that all property real or personal, owned by a married woman at the time of her marriage, or acquired by her thereafter, should be and remain her separate property, free from the control of her husband."[20] And, in most of the states, the statutes, either expressly or by construction of the courts, "give married women the power to convey or dispose of their

[18] Madden, § 31, p. 91.

[19] In equity, even before the married women's reform legislation, a married woman could hold as a feme sole free from the control of her husband real or personal property settled to her sole and separate use, and in most jurisdictions a married woman had the power to dispose of her equitable separate estate, real or personal, though no power to do so was expressly conferred by the instrument creating it, provided the power was not expressly excluded by the instrument. However, in some jurisdictions it was held that the power must be expressly conferred or she would have no power to alienate or charge the property. Furthermore, in England, and in most of the states, a married woman had the power, as an incident to her equitable estate, to charge it by contract unless the power was excluded in the creation of the estate, but in some states the power had to be expressly conferred or it did not exist. In both England and the states the contract had to be made upon the faith of the estate.

[20] Madden, § 42, p. 110.

property real or personal, but in a number of states the statutes require that the husband join in a wife's conveyance of her land in order to make it valid. In some states a husband has an inchoate interest in his wife's land such as curtesy, statutory dower, or homestead, which is not divested by her conveyance of her lands, unless he releases such interest by joining in the conveyance or otherwise."[21]

In regard to the capacity of a married woman to contract, "in many states the statutes expressly and plainly say that a married woman may contract as if sole. Under such statutes a wife may make any contract which any other competent person could make, and it may be enforced against her by an action in personam, and the judgment may be collected out of her property by the ordinary methods."[22] In other states the statutes permit a married woman to contract with reference to her separate property. In a third group of states, the statutes at an intermediate stage in the development of this subject did not expressly confer any contractual capacity upon married women but merely said that they might acquire and hold property as if sole, and might enjoy their separate property as if sole, and such statutes have been construed as giving a limited capacity to a married woman to charge her separate estate by contract.[23]

TERMINATION OF THE RELATION

65. A marriage relation is terminated by the death of either of the parties, or by divorce.

A divorce is the legal separation of a husband and wife by the judgment of a court. There are two kinds, and a divorce may either: (a) dissolve the marriage, in which case it is called a divorce "a vinculo matrimonii"; or, (b) it may suspend the effect of the marriage only in so far as cohabitation is concerned, in which case it is called a divorce "a mensa et thoro," or judicial separation. [24]

[21] Madden, § 43, p. 110.

[22] Madden, § 47, p. 137.

[23] "In a number of states the statutes enlarging a married woman's capacity to contract expressly deny to her the capacity to enter into a contract of suretyship. In some states the only contracts of suretyship which she is forbidden to make are those in which she becomes surety for her husband." Madden, § 48, p. 142.

[24] In England there was no method by which an absolute divorce could be secured except by a special act of Parliament until 1857, when the stat-

Grounds

The grounds on which a divorce can be obtained vary with the statutes of the different states, but among the grounds most commonly allowed are: (1) Adultery, which is the voluntary intercourse of a married person with another than his or her wife or husband. (2) Cruelty, which generally must consist in the infliction, or threatened infliction, of bodily harm. (3) Desertion, which is the withdrawal from cohabitation by one of the parties with intent to abandon the other without the latter's consent and without justification.[25] Various other grounds not so commonly prescribed include: (a) habitual drunkenness; (b) conviction of crime and imprisonment, under certain circumstances; (c) incurable insanity; (d) separation not amounting to desertion; (e) nonsupport, under certain circumstances; (f) divorce obtained by the other party in another state; and, (g) causes rendering marriage void or voidable such as impotence, relationship, prior marriage, mental incapacity, nonage, fraud, and duress.[26]

Defenses

The defenses which may be asserted to an action for divorce include: (1) Connivance, which is the corrupt consenting by one spouse to an offense by the other. (2) Collusion, which is any agreement between the parties whereby they seek to obtain a divorce by an imposition on the court. (3) Condonation, which is the forgiveness of a marital offense constituting a ground for divorce. (4) Recrimination, which is a countercharge in a divorce action that the complainant has been guilty of an offense constituting a ground for divorce.

ute which created the Court of Divorce and Matrimonial Causes was enacted. "Judicial divorce a vinculo matrimonii was established in this country much earlier than in England. For example, in Pennsylvania as early as 1785, a complete code of grounds of divorce both from bed and board and from the bonds of matrimony was enacted, which was copied from the statutes of Scotland." Madden, p. 261.

[25] "The cause for divorce is determined by the law of the place which is the domicile at the time the divorce is sued for." Madden, § 96, p. 312.

[26] "In some states courts of equity, even without a statute, decree separate maintenance (to be distinguished from absolute divorce) to a wife whose husband does not support her. In most other states statutes have conferred a similar jurisdiction upon a court of domestic relations or some other court." Madden, § 99, p. 330.

PARENT AND CHILD

66. The legal status of a child in relation to its parents may be either legitimate, illegitimate, or adopted.

A child is legitimate, at common law, when it was begotten or born during the lawful wedlock of its parents; and, very generally by statute in the United States, when its parents marry subsequent to its birth. A child is illegitimate, at common law, when begotten and born out of lawful wedlock.[27] In most jurisdictions, "by statute, but not at common law, a person may adopt a child, and in such a case, unless there are statutory provisions to the contrary, the rights, duties and obligations arising from the artificial relation will be substantially the same as those arising from the natural relation of parent and child." [28]

Duties of Parents

Concerning parental duties, "whether there is a legal duty on the part of the father, at common law, to maintain his minor child, so as to render him liable for necessaries furnished the child, is a question upon which the authorities are conflicting. (a) In England, and in some states, it is held that there is only a moral obligation, in the absence of a statute, and that there is no liability for necessaries unless there is a promise in fact to pay for them, express or implied. But even in these jurisdictions it is usually provided by statute that the municipal authorities may compel the father if he is able to do so, to support his child. In most states it is a penal offense if the father neglect to support his minor child. (b) In other states it is held that the obligation is a legal one, and that there is a liability for necessaries, in case

[27] "The natural relation between a parent and his illegitimate children does not, at common law, give rise to those rights and duties which pertain to the legal status of parent and child. But to some extent the law recognizes bastards as children. Thus: (a) The mother is entitled to the custody and services of her illegitimate child, as against the father or strangers; but the welfare of the child may require the court to award its custody to another. (b) The child's domicile is determined by that of its mother. (c) The putative father is under no legal obligation to support his illegitimate child, but now, by statute, he may very generally be compelled to do so. (d) At common law, a bastard cannot inherit, and can have no heir except of his own body; but this rule has been to a great extent modified by statute." Madden, § 105, p. 348.

[28] Madden, § 106, p. 354.

of nonsupport by the father, in the absence of any promise in fact, or else that, if the obligation is merely a moral one, it is nevertheless sufficient to create such a liability." [29] On the other hand, "if the mother, by the death or abandonment of the father, or by a decree of court, has succeeded to the father's right to the custody of a child, she succeeds also to his duty to support the child, but may, if the father be living, recover from him the amount expended for such support, the ultimate liability remaining upon the father." [30]

In regard to education, "there is a legal duty on the part of a father to educate his child. If the child is in the custody of the father, a common school education, or the minimum of education prescribed by compulsory school laws, may be all that is required. But if the father has lost the custody of his child but is still liable for its support he may be compelled to furnish such education as his station in life and financial ability, and the capacities of the child may justify." [31]

A parent also has the duty of protecting his child, a duty fully recognized by the common law. Consequently, "a parent may justify an assault and battery, or even a homicide, in the necessary defense of the person of his child." [32]

Rights of Parents

Generally, the rights of parents in respect to their children are as follows: (1) The father, and, by the weight of authority, the mother on his death, is entitled to the services and earnings of a minor child while the child lives and is supported by them and has not been emancipated. (2) The father, or the mother who has succeeded to the rights of the father, or any other person standing in loco parentis, may maintain an action: (a) against a person who has wrongfully injured the child, for the resulting loss of service and incidental expenditures; (b) against the wrongdoer for the seduction or debauching of a daughter, and recover for the loss of service, incidental expenses, and for the shame and disgrace to the family, the corrupting example to the other children, and punitive damages; (c) for loss of services and incidental expenses against one who abducts or wrongfully entices or harbors the child. (3) A parent, or one standing in loco parentis, may punish or discipline his minor child without subjecting himself to either criminal or civil liability, providing he does so in a reasonable manner.

[29] Madden, § 110, p. 383.

[30] Madden, § 111, p. 383.

In awarding the custody of a child, the courts give first consideration to the welfare of the child. Subject to this primary consideration, the father is considered as having the best right, and the mother as having the next best right, to the custody of a legitimate child; but statutes in some states make the rights of the parents equal. If there is no father or mother, or if both are deemed unfit, other near relatives, or persons not related, succeed to the right of custody according to the circumstances. The mother of an illegitimate child has the same right to its custody as the father of a legitimate child.

[31] Madden, § 113, p. 394.

[32] Madden, pp. 397, 398.

A parent is not liable, merely because of their relation, for the torts of his child, nor does the relation of parent and child render the former liable for the crimes of the child.

A parent, by reason of their relation, has no rights in the property of his child. "Whatever property a child may acquire in any manner, except as compensation for services rendered by him, belongs to him absolutely, and the parent, as such, has no claim to it." [33] Furthermore, "a child is under no legal obligation to support his parents, unless the duty is imposed by statute." [34]

Emancipation

A child is said to be "emancipated" when he has been released from parental control and has become entitled to his own earnings. Emancipation may be effected: (1) By the consent of the parent, express or implied. (2) By operation of law, (a) where the parent fails to support or abandons the child; (b) where the child enters into a valid marriage, whether with or without the consent of the parent; and, (c) where the child attains his majority, which is at 21 years, or, in some jurisdictions in the case of females, 18 years.[35]

INFANTS

67. All persons under twenty-one years of age are infants at common law, but by statute in some states females attain majority at eighteen years of age, and in some states all minors attain majority on marriage.

Privileges and Disabilities

Infants are favorites of the law and for their protection the law has conferred certain privileges and has imposed certain dis-

[33] Madden, § 132, p. 439.

[34] Madden, § 141, p. 452.

[35] "The emancipation of an infant by act of the parent or by marriage, while removing some of the disabilities of infancy, does not enlarge the capacity to contract. In some states, however, the disabilities of infancy may be removed by judicial proceedings." Madden, § 229, p. 612.

abilities upon them. Thus an infant can hold an office which is purely ministerial, but not one calling for the exercise of discretion, or involving financial responsibility. At common law, the will of a male at 14, and of a female at 12 years of age, was valid as to personal property, but an infant could not make a valid will of real property. (But by statute in England, 1 Vict. c. 26, § 7, and in many of the states, only persons who have reached the age of 21 years may make wills.)

An infant cannot sue in person or by an attorney, but only by guardian or next friend, and when sued he cannot appear in person, by attorney, or next friend, but only by a general guardian or by a guardian ad litem. In most of the states the appointment of a next friend or guardian ad litem is regulated by statute and where an infant is sued, and has appeared by guardian ad litem, he is bound by the judgment or decree as fully as an adult. An infant is competent to testify as a witness only if he understands the nature of an oath.

An infant can enforce a contract against another party who contracted with him whenever an adult in the place of the infant could have enforced the contract; but in many instances, an infant is not legally liable for the nonperformance of his executory contracts even though the other party to the contract has performed his part of the agreement.[36] The latter rule, however, is subject to various exceptions. As for executed contracts, that is, where an infant has conveyed land, sold chattels, or released rights, he may, as a general rule, disaffirm the transaction and restore to himself the land, chattels, or rights; but not if, after attaining his majority, he has affirmed such executed acts.[37]

[36] "The former infant after he reaches majority loses his immunity from liability upon executory contracts made while an infant, by ratifying or affirming such contracts after he reaches majority;" but, "it is held in some jurisdictions that some contracts of an infant such as a contract made by an agent or attorney appointed by him during infancy, a contract of suretyship, or a bond with a penalty cannot be ratified and thus made enforceable against the former infant after he reaches majority." Madden, §§ 204, 207, pp. 554, 564.

[37] "If an infant, before or after majority, disaffirm a sale or conveyance or payment or release made by him during minority, for which he received a consideration, he is under a duty to return or surrender so much of the consideration received by him for such transfer, as he still has, either in its original form or in any other form into which he may have, by exchange or other means, converted it; [however] in some jurisdictions, under the circumstances mentioned, * * * the infant is under a duty to account for and replace all the consideration which he received, even though he no longer has it, or all of it, either in its original form or in any converted form." Madden, §§ 215, 216, p. 583.

An infant is liable for necessaries furnished to him, his wife, or, in some jurisdictions, to his children if he refuses or neglects to provide for them. However, generally, the infant is liable only for the reasonable value of the necessaries furnished.[38]

In regard to torts committed against or by him: "an infant has the same right as an adult to sue for tortious injuries";[39] and "must answer for his torts as fully as an adult, and the fact that the tort is committed under authority or command of his parent is no defense." [40]

GUARDIAN AND WARD

68. A "guardian" is one to whom the law intrusts the person or estate, or both, of another who, by reason of infancy or mental infirmity, is not sui juris, and the latter is called a "ward."

Guardianship is defined as "a trust which is dual in its nature, involving two distinct and separate functions—the control of the person of the ward, and the management of his estate. Guardians are therefore divided into two classes—guardians of the person, * * * and guardians of the estate. * * * A guardian of the person is one who is lawfully invested with the care of the person of the ward. A guardian of the estate is one who has been lawfully invested with the power of taking care of and managing the estate of an infant." [41] Some guardians have charge of only the person of the ward, some only of his estate, and some have charge of both the person and estate of the ward.

The various kinds of guardians are as follows: (1) Natural guardians. "The father, or, if he is dead, the mother, or, if both

[38] What are "necessaries" depends upon the circumstances of the particular case. "The term includes whatever is reasonably needed for subsistence, health, comfort, or education, taking into consideration [the infant's] state, station, and degree in life. The term does not include (a) What is purely ornamental. (b) What contributes solely to pleasure. (c) What he is already fully supplied with. (d) Articles which might otherwise be necessaries, when he is living under the care of his parent or guardian, and is supplied by him with such things as he considers necessary. (e) What concerns his estate or business, and not his person." Madden, § 200, p. 542.

[39] Madden, § 223, p. 601.

[40] Madden, § 225, p. 604.

[41] Madden, pp. 455, 456.

are dead, the next of kin is the natural guardian of a child. A natural guardian is a guardian of the ward's person only." [42] (2) Guardians in socage. This kind occurred where an infant acquired by descent land held in socage. "The next of kin who could not possibly inherit became guardian and had authority over the person of the infant as well as the land, and over personal property connected with it, but not over other personalty. On reaching the age of 14, the infant could elect his own guardian and terminate the guardianship. This kind of guardianship is obsolete at common law, but there is a similar guardianship by statute in some jurisdictions." [43] (3) Testamentary guardians. "By statute, a surviving parent, on his death, may, generally by will, and in some states by deed, appoint a guardian for a minor child. Such a guardianship extends to the person, and to the real and personal property, of the ward, and continues until the ward's majority." [44] (4) Chancery guardians. "Courts of chancery, in the absence of statutory limitations, have jurisdiction to appoint guardians of the persons and estates of infants." [45] (5) Statute guardians. Guardians of the persons and estates of infants are generally appointed in the United States by courts of special statutory jurisdiction and consequently are known as "statute guardians." (6) Quasi guardians or guardians by estoppel. This kind includes those who have no right, but who assume to act as guardians and therefore can be made to account as such. (7) Guardians of persons non compotes mentis. "Generally, by statute, the probate or some similar court is given the power to appoint a guardian of the person and estate of persons who are non compotes mentis. In some states the power is extended to include spendthrifts." [46] (8) Guardians ad litem. "A guardian ad litem is a guardian appointed by a court of justice to prosecute or defend for an infant in a suit to which he is a party." [47]

Rights, Duties, and Liabilities of Guardians

Fundamental principles relative to the rights of guardians are as follows: (1) Except in this country, the guardian is ordinarily entitled to the custody of his ward as against the parents, but a guardian as such is not entitled like a parent to the services and earnings of his ward. (2) "By the weight of authority, when the ward lives with the guardian as a member of his family, receiving

[42] Madden, § 145, p. 456.

[43] Madden, § 146, p. 457.

[44] Madden, § 147, p. 459.

[45] Madden, § 148, p. 461.

[46] Madden, § 151, p. 463.

[47] Madden, § 152, p. 464.

support, and rendering the ordinary services of a child, the guardian is not entitled to an allowance for such support, in the absence of an agreement, the relation in such case being quasi parental." [48] (3) Unless he has obtained leave of court to use principal, a guardian is restricted to the use of the income of the estate in the maintenance and education of the ward. (4) A natural guardian can change the domicile of his ward, and other guardians can change the municipal domicile of their wards, but, by the weight of authority, they cannot change the state or national domicile of their wards. (5) By statute, guardians on leave of court may sell realty of their wards to pay debts, future maintenance and expenses if the personal property is insufficient, and in some states this is allowed for the purpose of making more advantageous investments; but sales without license from a court, or from a court without jurisdiction, are void. (6) A guardian may sell the personalty of his ward without court leave. (7) A guardian can execute all instruments necessary and within the scope of his trust, but he cannot bind the ward or the estate of his ward by covenants. (8) The authority of a guardian is strictly territorial, but foreign guardians are recognized in most states, as a matter of comity, following compliance with relevant statutory regulations. (9) In the settlement of his accounts a guardian will be allowed compensation for his services, but only if he has faithfully executed his trust.

Concerning the duties of guardians, the following precepts are fundamental: (1) A guardian is bound to maintain his ward from the income of the estate; but he is not bound to furnish support personally, or even to pay for necessaries furnished the ward, and no promise on the part of the guardian to do so will be implied without his consent. (2) A guardian is bound to exercise ordinary care and prudence in the management of the estate of the ward. A guardian is bound to collect and protect the property of his ward of every description and therefore the guardian may: (a) bring suit in the name of his ward, or in his own name, on contracts made by him as guardian; (b) accept property in settlement of claims; (c) compromise claims; and, (d) submit claims to arbitration. (3) A guardian is bound to invest the funds of his ward within a reasonable time and if he fails to do so he will be charged interest, and in the case of gross delinquency, compound interest. (4) A guardian must lease the realty of his ward, keep the buildings in repair, and collect the

[48] Madden, § 161, p. 473.

rents. (5) A guardian must file an inventory of the estate, account from time to time, and render a final account at the expiration of the guardianship.

The following principles are fundamental in regard to the liabilities of guardians: (1) A guardian cannot bind either the estate or the ward by contract but rather, "is primarily personally liable on contracts, though made by him as guardian, and on behalf of the ward, but in proper cases he is entitled to reimbursement." [49] (2) A guardian is a trustee and consequently cannot reap any benefit from the use of his ward's property, purchase at a sale of his ward's property, or sell his own property to his ward.[50] (3) A guardian who exceeds his authority is liable for any resulting loss although he acted in good faith; and if there is a benefit instead of a loss in such a case, the ward may claim it. (4) When the same person is at once executor or administrator and guardian, he is primarily liable as executor or administrator for funds due the ward as legatee or distributee of the estate and becomes liable as guardian on charging himself in that capacity. (5) If the final settlement of the account of a guardian is made with the ward out of court, and the guardian gains any advantage, the settlement will be set aside unless it appears that the ward gave his deliberate, intelligent and voluntary acquiescence, or is guilty of laches in asserting his rights.[51]

Termination of Guardianship

The legal relation that exists between a guardian and ward is terminated in the following ways: "(a) By the ward's reaching his majority. (b) By the death of the ward. (c) By the death of the guardian. (d) By the marriage of a female ward. (e) Under the statutes of some states, by the marriage of a female guardian. (f) By the resignation of the guardian, if he is permitted to resign. (g) By removal of the guardian by the court,

[49] Madden, § 160, p. 473.

[50] Correlatively, "the ward has all the rights, as against the guardian, that a cestui que trust has against the trustee. And therefore—(a) He may ratify the wrongful use of his property by the guardian, and claim all profits arising therefrom, or repudiate the transaction and hold the guardian to account. (b) He may repudiate purchases of his real estate by his guardian, and claim a resulting trust. (c) He may trace and reclaim personal property converted by his guardian, when it can be identified." Madden, § 166, p. 481.

[51] "Gifts from a ward to his guardian, made during the guardianship, or shortly after its termination, are presumed to have been made under undue influence; and, to uphold them, it must be shown that they were made voluntarily and understandingly." Madden, § 183, p. 511.

when he fails to perform his duty, or when he is unfit for the position." [52]

MASTER AND SERVANT

69. A "master" is a person who has the right to direct, within certain limits, the action of another called a "servant," the latter being bound to obey the proper orders of the former.

The term "servant" is used to denote both apprentices and hired employees, but the two are distinct. An apprentice is one bound in law to serve his master for an agreed time during which he is to be taught some art or trade by his master. Infants may be bound to apprenticeships either voluntarily by contract, or involuntarily under statutes. Such statutes are strictly construed, however, and may be invoked only when the circumstances which they require are present. Generally, they embrace only children who are in unfortunate circumstances such as the offspring of unfit parents, bastards, destitutes, and abandoned children. But in proper cases, parents, guardians, courts and various other agencies having lawful authority therefor, may bind out infants as apprentices. Adults may also bind themselves to apprenticeships, but, as a rule, one who has attained his majority cannot be bound as an apprentice against his assent.

The rights and liabilities of a master and his apprentice are defined by the covenants in the indenture by which their relation is created. However, the master is usually entitled to the custody and services of the apprentice, although the indenture may require him to compensate the apprentice for such services. And he is also usually entitled: (a) to the earnings of the apprentice, unless the earnings are acquired for outside services with the consent of the master; (b) to retake his runaway apprentice; and (c) to recover for injuries which disable his apprentice and which are caused by third persons. On the other hand, unless their indenture provides otherwise, the master must take care of and maintain an infant apprentice, educate him generally and professionally, and govern his conduct. Correlatively, the apprentice must obey the lawful orders of his master. The relation of master and apprentice may be terminated by the death or misconduct of either party, by the infant's attainment of his majority, or by cancellation.

The more common relation of employer and employee is distinguishable from that of master and apprentice in that under

[52] Madden, § 184, p. 515.

the former the employer is not required to instruct or educate the employee, nor is the employer bound to such other duties as are imposed on a master of an infant apprentice and which impress their relation with a nature or character analogous to that of the parent and child relationship. The relation of employer and employee arises out of contract and the employee is entitled to his earnings. In fact, the relation of employer and employee is usually characterized by compensation required to be paid the employee by the employer and in consideration of which the employee's services are rendered. Generally, anyone of full age is capable of becoming either an employer or employee.

In early England, the principal class of servants consisted of persons who performed services about the households of their masters and the position which they occupied was more in the nature of a domestic status than a contractual relation, but in modern times the relation of master and servant has generally been, and generally is, one of contract.

CHAPTER 14

REAL PROPERTY

ESTATES

70. In the law of real property the word "estate" refers to the quantity, quality, nature, duration and exclusiveness of the interest which a person may have in land.

In General

The term "real estate" is frequently used as a synonym for real property, or land, or a person's interests in lands, but these are popular meanings of the term. In its legal sense the word "estate" indicates the quantity, quality, nature, duration and exclusiveness of the interest a person has in land, and particularly the quantity of his interest, whether it be fee simple, fee tail, for life, for a term of years, or otherwise.[1] "In Anglo-Saxon law there was no doctrine of estates, but in Norman times the word came to have its technical meaning. In its technical sense, therefore, the term 'estate' is used only in connection with real property. There can properly be no estates in personalty. A person's interest in land may be, however, as absolute as the ownership of personalty, or it may be for a limited time, or qualified by conditions."[2]

Classification of Estates

Estates are classified: (a) as to their quantity; (b) as to their quality; (c) as to their legal or equitable nature; (d) as to the time of their enjoyment; and (e) as to their exclusiveness or number of owners.[3]

[1] Cf., "The word 'estate,' * * * means an interest in land which (a) is or may become possessory; and (b) is ownership measured in terms of duration." Restatement of the Law of Property, (hereinafter cited "Restatement") § 9, p. 23.

[2] Burdick on Real Property, (hereinafter cited "Burdick"), p. 59. However, the term "estate" is used to indicate interests in land which are less than freehold estates and which, consequently, constitute personalty rather than realty.

[3] For definitions of terms relating to estates contained in the Restatement, see §§ 14–26, pp. 39–70, of that work.

Quantity of Estates; Freeholds and Nonfreeholds

The quantity of an estate is determined by the period of its duration; its extent. As to their quantity, estates are either freeholds or less than freeholds ("nonfreeholds," also called "leaseholds"). Estates of freehold are either: (1) estates of inheritance, which subdivide into (a) estates in fee simple, and (b) estates in fee tail; or, (2) estates not of inheritance, or life estates. Estates less than freehold include: (1) estates for years; (2) estates at will; (3) estates from year to year; and, (4) estates at sufferance.

The duration of a freehold estate is uncertain. In early English law the term "freehold" was used to indicate an estate which was deemed as of such dignity that its ownership was becoming to a freeman. An estate for a certain time was not regarded as of such dignity, being necessarily limited in its duration. As an estate for life might be held by its owner for as long as he was able to enjoy any estate personally it was regarded as a freehold; and, of course, if an estate was to continue for a person's life and then descend to his heirs it was a freehold. However, an estate for a certain, definite period, even if for a thousand years, was regarded as of less dignity than an estate for life and was not a freehold. Only such interests in land as are freehold estates constitute real property; estates less than freehold are personal property.

The "possession" of one who claims a freehold interest in land is termed "seisin," and it may be either seisin in deed (or fact), or seisin in law. Seisin in deed is the actual possession of the immediate freehold, but this does not mean actual possession of the land. The land may be in the actual possession of a tenant for a term of years. Seisin in law, on the other hand, "applies to an heir at law of an ancestor who dies seised, and refers to the time intervening before the heir's entry in case the possession is vacant at that time. When the heir enters, he is seised in fact, or in deed."[4]

Freeholds of Inheritance; Fee Simple, Fee Tail

The freehold estates of inheritance are either: (1) estates in fee simple; or, (2) estates in fee tail. A fee simple estate is a freehold in perpetuity. It is an estate limited to a man and his heirs forever and is the largest possible estate in land. The word "fee" is not used here in its original meaning of a "feud", that is

[4] Burdick, p. 56.

land held of a superior as distinguished from allodial land,[5] but denotes, rather, an estate of inheritance; an estate that descends to a man's heirs. And the word "simple" means that the estate descends to the holder's heirs generally, and is not conditioned or restricted to any particular class of heirs. "A fee simple is, in theory, equal to absolute ownership, at least so far as there can be absolute ownership. * * * It represents the whole ownership of the land. Out of the fee simple all other estates are carved. The powers incident to estates less than fee simple are in all cases less than those of this estate."[6] In modern estates and conveyancing, the terms "fee," "fee simple," and "fee simple absolute," are substantially synonymous.[7]

An estate tail is an estate of inheritance which descends only to the heirs of the body of the donee or to some special class of such heirs. "Estates tail are divided into the following six classes: (1) Estates in tail general, the donee being the only parent named, and descending to heirs of either sex. (2) Estates in tail general male, only one parent named, but descending only to male heirs. (3) Estates in tail general female, only one parent named, but descending only to female heirs. (4) Estates in tail special, both parents named, and descending to heirs of either sex. (5) Estates in tail special male, both parents named, but descending only to male heirs. (6) Estates in tail special female, both parents named, but descending only to female

[5] There were, at the time when the feudal system was in force, certain lands which did not come under its operation. These were called "allodial lands." The owner of such lands had free control over them, as he did not hold them of any superior lord, and the interest which the owner of an allodium had was not called an estate, the term "estate" being then used in reference only to the interests in land of those who held under a superior. Lands which came under the operation of the feudal system could not be thus independently owned. All that a feudal tenant could own was an "estate" in land, and the fee simple was the greatest of the estates. The practical difference between an estate in fee simple and the interest of an allodial proprietor was that the former was held by tenure, to which various personal services were attached, whereas the latter was free from all feudal conditions. In the United States, although interests in lands are defined and classified as "estates," and the distinctions between different kinds are recognized and enforced, lands, for all practical purposes, are allodial.

[6] Burdick, p. 62.

[7] Unless otherwise provided by statute, in order to create a fee simple estate by deed, the rule of the common law requires that the conveyance read to the grantee "and his heirs," otherwise the grantee would take only a life estate. The technical words are not required, however, in a strict quitclaim deed. Since the Statute of Quia Emptores, 18 Edw. I, cc. 1, 3, 1290, the right of an owner

heirs."[8] In most of the states of the Union, estates tail have been abolished or modified by statute. "Some states have turned them into either—(a) Estates in fee simple; or (b) Life estates, with remainders in fee to the donee's heirs who would take under the entail; or (c) Estates tail in the donee, with estates in fee to the issue. In a few states, estates tail still exist."[9]

Freeholds Not of Inheritance; Life Estates

Freehold interests in land which are not of inheritance are termed "life estates." They include: (1) estates for the life of the tenant; (2) estates for the life of another (pur autre vie); and, (3) estates for an uncertain period which may continue during a life.[10] They are terminated by death of the persons whose

of an estate in fee simple to alienate it has been an inherent incident of such an estate, and such estates have been devisable by will since the Statute of Wills, 32 Hen. VIII, c. 1, 1540.

8 Burdick, § 33, p. 72.

9 Burdick, § 38, p. 81.

"Estates tail may be created either by deed or by will. At common law, if the estate is created by deed, the phrase 'to [the donee] and the heirs of his body' is the appropriate form of limitation. * * * There must always be * * * some words which show that the heirs of the donee's body, or some class of them, are to inherit the estate. If words of inheritance are absent, the donee takes only a life estate, while the omission of the words of procreation, provided the word 'heirs' is used, gives the donee a fee simple." Burdick, p. 74. However, in England, under the Conveyancing Act of 1881, 44 & 45 Vict. c. 41, an estate tail may be created by the use of the words "in tail," as, for example, "to A in tail"; the words "heirs of the body" no longer being necessary. And, in the same way, an estate in tail special may be created by the words "in tail male" or "in tail female."

10 The following limitations would create estates for life: (1) "to A for his life"; (2) "to A for the joint lives of B and C"; (3) "to A for the lives of A, B, and C, and the longest liver of them." See Restatement, p. 46. An estate pur autre vie is the lowest estate of freehold, and usually arises, "when one who is tenant for life assigns his interest to another, who thereby becomes entitled to the land during the life of the grantor. It may, however, be expressly limited for the life of a third person. The one whose life limits the duration of the estate is called the 'cestui que vie.' At common law, if the tenant of an estate pur autre vie died before the cestui que vie, whoever first entered and took possession of the land could hold it for the remainder of the term. Such a person was called a 'general occupant.' If, however, the tenant had leased or assigned his estate, or words of limitation, as 'heirs' or 'executor,' had been added in the creation of the estate, then these were entitled to the residue, and they were called 'special occupants.' By the statute, however, of 29 Car. II, [c. 3] general occupancy was abolished, and thereafter, when a tenant pur autre vie died without having disposed of his estate, then, if the term was not limited to the heirs, the executor took the residue, holding it as assets for the payment of debts. This act also gave the owner power to dispose of it by will. In this country, also, the question of occupancy is now usually regulated by statute" Burdick, p. 87.

lives measure them. As to the mode of their creation "life estates are either—(a) Conventional, that is, created by act of the parties; or (b) Legal, that is, created by construction and operation of law. Conventional life estates may be measured by one or more lives."[11]

In the United States, all "legal" life estates of practical importance arise out of the marital relation. They include, at common law: (1) estate during coverture, or by marital right; (2) curtesy; and, (3) dower. By force of statute they also include homesteads. An estate during coverture or by marital right, is the right which the husband acquires at common law to the use and profits of his wife's realty and to her chattels real. However, this right of the husband is qualified or abrogated by the equitable doctrine of the wife's separate property, and by statutory changes in nearly all of the states.

An estate by curtesy, at common law, is an estate for the life of the husband in all of his wife's estates of inheritance, the requisites being: (a) valid marriage; (b) issue born alive and capable of inheriting; (c) sufficient seisin of the wife during coverture; and, (d) death of the wife before the husband. Curtesy is said to be "initiate" when issue capable of inheriting is born alive, and "consummate" at the wife's death, if the other requisites have existed. The husband is entitled to curtesy in the following: (1) estates of inheritance, generally; (2) equitable estates; (3) estates in expectancy, when they vest in possession during the life of his wife; (4) joint estates, except joint tenancies; and, (5) determinate estates, when they are determined by a shifting use or an executory devise, and in all cases until they are defeated. In the United States "there has been legislation which has made radical changes in the estate of curtesy. In some states curtesy has been expressly abolished by statute; in some, the estate is made the same as dower; and in others, a distributive share is given. Moreover, the changes effected by the married women's acts, * * * have nearly abolished curtesy initiate by giving wives extensive powers to control and dispose of their realty."[12]

Dower is "the provision which the law makes for a widow out of the lands or tenements of the husband for her support. At common law, it is a life estate in one-third of the husband's es-

11 Burdick, § 41, p. 84.

12 Burdick, p. 117.

tates of inheritance."[13] The requisites of dower are: (a) marriage; (b) seisin of the husband during coverture; and, (c) death of the husband before the wife. Generally, at common law, "the widow has a dower in the husband's estates of inheritance, providing the estate is one which issue of the wife could inherit. This right of dower extends to land, and to all incorporeal real hereditaments; that is, those which savor of the realty. (a) In some states the land must be capable of beneficial enjoyment as a life estate. (b) The estate must not be terminated by the happening of a contingency. (c) At common law, the husband's estate must be a legal one. At the present time, however, there may be dower in equities of redemption, and in many states, by statute, in all equitable estates. (d) The husband must be seised in possession, not in expectancy. (e) The estate must be one not in joint tenancy."[14]

In most states statutes provide that the family residence or home owned and occupied as prescribed by statute shall be exempt from liability for certain debts.[15] This right is an exemption (a) to the owner for life; (b) to the surviving spouse for life, in most states; and, (c) to the children during their minority, in some states. Generally the exemption can be claimed only by the "head of a family," and is usually acquired by actual occupancy, in good faith, of the premises as a home. As a rule, any estate in possession, legal or equitable, will support a homestead, but in some states a homestead cannot be claimed in joint estates. The amount, extent and value of the homestead are limited by the statutes, and these statutes differ in the different states. Unless forbidden by statute, a homestead may be sold or mortgaged, but in most states the husband and wife must join in the conveyance.

Estates Less than Freehold

Estates less than freehold are: (1) estates for years; (2) estates at will; (3) estates from year to year; and (4) estates at

[13] Burdick, § 53, p. 118.

[14] Burdick, § 54, p. 123.

[15] A homestead is exempt from liability for most debts, but "there are certain debts that are enforceable against it. They are, generally, as follows: (a) Public debts, in most cases. (b) Liabilities for torts, in some states. (c) Debts contracted before the passage of the homestead laws. (d) Debts contracted and liens attaching before the acquisition of the homestead, in many states. (e) Debts contracted in removing incumbrances, in a few states. (f) Liens for the improvement, or preservation of the property, in many states." Burdick, § 71, p. 179.

sufferance. "Under the feudal system, the only interest in land that could be created was a freehold; that is, an estate at least for life. In time, however, there grew up a custom of granting the use of land to tenants for stipulated periods or terms. These terms were originally of but short duration, only a few years in length, and anciently a lease for a longer term than forty years was held to be void. They gradually increased in length, however, until in modern times leases for ninety-nine years are not uncommon. In fact, leases for nine hundred and ninety-nine years, and even for ten thousand years, are not unknown. At common law, estates for years, no matter how long, are but chattel interests, not real property. By force of statute, however, in some states, terms exceeding a certain number of years, usually three, are treated as real property for some purposes, as, for example, under the laws regulating the attachment and descent and distribution of property. Regardless, however, of the length of the term, estates for years are of less dignity, by common law, than life estates, although a life tenant would not live as long as the designated period."[16]

An estate (or a tenancy) for years is an estate created for a definite period, measured by one or more years or fractions of a year. The grantor of such an estate is called the "lessor" or "landlord," and the grantee is called the "lessee" or "tenant." A contract by which an estate for years is created is called a "lease." Estates for years include all leases for a definite, ascertained period, whether for a number of years, one year, a month, or a week, the word "years," as used here, meaning merely a definite unit of time. The only requirement as to the term is that it be for a fixed period. Statutes in some states, however, limit the number of years for which such an estate may be created.

An estate (or tenancy) at will is the estate which is created when land is let during the joint will of the parties. Such an estate is terminable at the will of the lessor and also at the will of the lessee and has no other specified period of duration. Tenancies at will, at common law, may be terminated at any time by either party, but they may agree to give notice before terminating and in many of the states notice to terminate an estate at will is required by statute.

An estate from year to year[17] is an estate which will continue for successive periods of a year, or successive periods of a frac-

[16] Burdick, pp. 184, 185.

[17] Also termed an "estate from period to period." See Restatement, § 20.

tion of a year, unless terminated. These estates partake of the nature of both estates for years and of estates at will. Originally they were estates at will with rents payable periodically, that is, by the week, month, or year. "A tenancy from year to year may be terminated, at common law, by either party by a notice given six months before the end of any year. It is also the rule that such a tenancy may be terminated by a notice equal to the length of the periods when the tenancy is for periods of six months or less. These rules, however, do not apply when a different notice has been provided for; (a) By agreement of the parties; or (b) By statute, as is the case in most states."[18]

An estate (or a tenancy) at sufferance is a wrongful holding over of lands after the expiration of a prior lawful tenancy or possession. To create such an estate the tenant must have come in by agreement, not as a trespasser, and he must hold without agreement. A tenancy at sufferance, at common law, may be terminated at any time by either party, without notice. However, in some states notice is required by statute.

Licenses

To be distinguished from nonfreehold estates are licenses. A license is not an estate. A license is an authority to do some act or a series of acts on the land of the licensor. They may be created either by express agreement or by implication, but being mere personal privileges are generally revocable at the will of the licensor except: (a) when coupled with an interest; (b) when affecting only an easement of the licensor; or, (c) in some states, when the licensee relying on the authority given has erected improvements on the licensor's land.

Quality of Estates; Absolute or Qualified

As to their quality, estates are either absolute or qualified. An absolute estate is one without modifications or conditions. Qualified estates, on the other hand, are estates that are subject to certain modifications or conditions. Under qualified estates may be classed: (1) estates upon condition; (2) estates upon limitation; (3) estates upon conditional limitation; and, (4) modified fees, the latter including (a) qualified, base, or determinable fees; and, (b) conditional fees.

Same; Estates upon Condition

An estate upon condition is an estate which is created, defeated, enlarged or diminished on the happening of some uncertain event.

[18] Burdick, § 90, p. 236.

Such estates are classified as: (1) estates upon condition precedent; and, (2) estates upon condition subsequent. Conditions precedent are conditions which must be fulfilled before the estates to which they are attached can vest or be enlarged; whereas conditions subsequent are conditions upon the fulfillment or nonfulfillment of which estates previously vested are defeated.[19] Generally a freehold estate on condition subsequent is not terminated merely by a breach of the condition until there has been a re-entry or claim.

Same; Estates upon Limitation[20]

An estate upon limitation is one which is collaterally limited by the words of its creation to endure until the happening of a certain contingency. The estate ends as soon as the contingency happens although otherwise it would continue for its natural duration.[21] "Estates upon limitation are distinguished from estates upon condition, in that in the former the estate ends absolutely as soon as the contingency happens, no entry being necessary as in case of an estate upon condition, but the next vested

[19] For example, if A should grant an estate to B, upon condition that B marry within a certain period, B's marriage within the stipulated time would be essential to the vesting of the estate in him; a condition precedent. On the other hand, if A should convey Blackacre to B and his heirs subject to the condition that if B or his heirs during the life of A should erect a saloon upon the land A would be entitled to re-enter and terminate the estate, B would have an estate in fee simple subject to a condition subsequent.

Conditions which are illegal or impossible of performance are void, and, when precedent, prevent estates dependent on them from vesting. When subsequent, void conditions are inoperative and of no effect.

[20] The word "limitation" in the law of real property is used in several senses. Primarily it means marking out or defining the quantity of an estate as illustrated in the phrase "words of limitation," for example, "to A and his heirs" or to "A and the heirs of his body," or when it is said that at common law a grant of land "without words of limitation" will convey only a life estate. The word "limitation" is also used in the sense of "estate," as, for example, "a limitation to A for life, remainder to B," or, in case of the determination of a preceding estate, "a limitation over to B." As used, however, in the phrase "estate upon limitation" the word means a termination upon the happening of a contingency. "It defines the time when an estate will end, namely, ipso facto upon the event of the expressed contingency, regardless of whether it would otherwise continue as a fee, an estate for life, or an estate for years." Burdick, p. 288.

[21] For example, if A, who owns Blackacre in fee simple, transfers Blackacre "to B for life or so long as B shall remain unmarried," B's interest would terminate upon marriage, otherwise it would endure for B's life.

remainder, or reversion, takes effect in immediate possession. The limitation specifies the utmost time of continuance, and the condition marks some event upon which the estate may be defeated."[22]

Same; Estates upon Conditional Limitation

An estate upon conditional limitation is an estate "limited to take effect after the determination of an estate which, in the absence of a limitation over, would have been an estate upon condition."[23] Such estates were unknown prior to the Statute of Uses,[24] but they arise since that statute under the forms of shifting uses; and also since the Statute of Wills[25] under the forms of executory devises. As defined, "estates on conditional limitation are limitations over to a third person upon the termination of an estate upon condition caused by the breach of the condition. They combine, therefore, the qualities of a condition and a limitation. When the condition is broken, the next particular estate passes to the person in whose favor the limitation is made."[26]

Same; Modified Fees

At common law, estates in fee could be subject to certain, special modifications and when so modified or qualified they were variously known as qualified, conditional, base, or determinable fees. A qualified fee simple estate was one which, instead of being limited to a man and his heirs, was limited to a man and the heirs of an ancestor whose heir he was, for the purpose of tracing the descent, when required, from such ancestor. Such estates are practically obsolete.[27]

A conditional fee was an estate limited to particular heirs, but such estates were turned into estates tail by the Statute De Donis.[28] "The statute affected, however, only freehold lands, and conditional fees may still exist, particularly in England, with reference to other hereditaments."[29]

22 Burdick, pp. 288, 289.

23 Burdick, § 116, p. 290.

24 27 Hen. VIII, c. 10, 1535.

25 32 Hen. VIII, c. 1, 1540.

26 Burdick, p. 290.

27 The terms "base fee," "conditional fee," "qualified fee" and "conditional limitation" are not used in the Restatement of the Law of Property. See *Special Note*, p. 120, and §§ 16, 23, 24, and 25, pp. 43, 55, 59, and 63, and c. 4, pp. 117–120, thereof.

28 13 Edw. I, c. 1, 1285.

29 Burdick, p. 291.

A base fee was the estate received by the remainderman upon the barring of an estate tail by fine.[30] The effect of a fine was to bar only the issue in tail, not the remainderman, and the grantee in such a case took what was called a base fee determinable by failure of the issue in tail; the land passing in such event to the remainderman. A determinable fee, on the other hand, was an estate in fee simple which could be terminated by the happening of some contingency expressed in the instrument creating the estate.

Nature of Estates; Legal or Equitable

Estates in land may be either legal or equitable in nature both as to their quantity and quality, legal estates being such as were recognized at common law, equitable estates being such as were originally recognized only in courts of equity.[31]

Same; Uses

An equitable right to the beneficial enjoyment of an estate, the legal title of which is held by another person, is termed a "use." "Owing to the strict rules of feudal tenure, including among other things, military service, forfeitures, escheats, and restraints on alienation, there arose in early times, in England, a desire to create a beneficial ownership in land which should not be subject to these incidents. One of the chief causes that promoted this desire was the statute against mortmain, [7 Edw. I, stat. 2, c. 3, 1279]. This statute prohibited gifts of land in mortmain; that is, to religious corporations. It owed its origin to the fact

30 "Fines were actions for the recovery of lands on a claim of title, which were compromised by the parties with leave of the court, and the judgment record entered in the case became the record of title." Burdick, pp. 79, 80.

31 "Estates known to the common law and subject to the principles of feudal tenure are known as 'legal estates.' * * * In addition to these estates, however, there are estates or interests in land which, although not recognized by the common-law courts, have been from very early times recognized and protected in courts of equity. To such estates or interests the term 'equitable estates' is applied. These estates may be of the same quantity and quality as legal estates. For example, an equitable estate may be created in fee simple, in fee tail, for life, or for years. They descend, in case of intestacy, the same as legal estates. They are subject to the rights of dower and curtesy. * * * Equitable future estates in remainder and executory interests may also be created, and under such limitations, moreover, as would not be possible in common-law estates. Under the doctrine of equitable estates or interests in land, a very important part of the modern law of real property has been developed, namely, the law relating to trusts." Burdick, pp. 294, 295.

that grants of land to such bodies were not favored by the great lords, since under such alienations the lord got a tenant who never died, who was never under age, who could never marry, and who could never commit felony. The lords, therefore, were deprived of their escheats, wardships, and forfeitures, the incidents that were to them most profitable under the feudal system."[32] To avoid these various burdens and restrictions, the practice of conveying lands to "uses" was introduced. That is, the owner of land would convey the legal estate to another, upon trust and confidence that the person to whom he conveyed would permit either the grantor or some other person to have the beneficial enjoyment or "use" of the land, and that the grantee of the legal title would execute estates according to the direction of the person who had the use, the latter being known as the "cestui que use." Such a transfer, originally called a "feoffment to uses," was introduced in England before the end of the thirteenth century and the person to whom the land was thus conveyed, "in trust and confidence," was termed the "feoffee to uses." The latter was the legal and only owner in the eyes of the common-law courts; but the chancery, (at that time usually under the control of clergymen), was not in sympathy with the purposes of the Statute of Mortmain, and consequently equity would enforce such conveyances. Thus, a dual system of land ownership arose and the legal title to a tract could be in one person while all the beneficial rights therein belonged to another.

Uses, although in the favor of some, were unpopular with the great landowners of England and this opposition attained culmination in the Statute of Uses.[33] This statute was intended to produce the effect that, whenever a person was entitled to the beneficial interest in land, the legal title should be vested in him. However, by reason of the terms of the statute and judicial constructions thereof, it was held not to apply to: (1) Chattel interests, or estates for years. (2) Active uses, or those under which the feoffee to use had active duties to perform in regard to the estate, such as collecting rents and profits, or selling the property. (3) Estates for the separate use of married women.

[32] Burdick, p. 295.

[33] 27 Hen. VIII, c. 10, 1535. "The statute of uses has been re-enacted in a number of our states, either in terms or in substance, and in some others it is held to exist as part of the common law. In other states, however, by virtue of statutory provisions or judicial decisions, the statute is not recognized. Some states, moreover, following the lead of New York, have abolished by statute all uses and trusts except in certain specified cases." Burdick, p. 298.

(4) A use upon a use, that is, where an estate was conveyed to A, "for the use of B, for the use of C." (5) Uses to grantees of legal estates. For example, a grant "to A and his heirs, to the use of A and his heirs." As the statute in its terms was restricted to cases of a person or of persons being seized to the use "of another person," a use to the grantee seised of the legal estate was not within it. In addition to such expressly declared uses, "there was another class of uses, known as resulting uses, or uses by implication. For example, if a feoffment were made without declaring any use, and without any consideration, a use arose by implication in the feoffor's or grantor's favor. On the other hand, if the feoffee, or grantee, did give some consideration, no express use being declared, the law raised an implied use in the feoffee's favor."[34]

Same; Trusts

Out of uses not within the Statute of Uses arose the modern trusts, as courts of equity continued to enforce such uses under the name of "trusts." A trust has been variously defined "and many writers have defined a trust in the same terms employed for the definition of a use. It would seem, however, that a 'use' is the beneficial interest enjoyed by a beneficiary, or the cestui que trust, while a 'trust' is the equitable obligation imposed upon the trustee; in other words, the terms are not identical, but correlative. Accordingly, others have more accurately defined a trust as an obligation under which a person who has the legal estate to property, is bound, in equity, to deal with the beneficial interest or use therein for the benefit of another, called the 'beneficiary,' or the 'cestui que trust.' "[35] According to the manner of

[34] Burdick, p. 302.

[35] Burdick, p. 303. Compare: "A trust is a relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another," (Bogert on Trusts, § 1, p. 1); and, "A trust, as the term is used in the Restatement of this Subject, when not qualified by the word 'charitable,' 'resulting' or 'constructive,' is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." Restatement of the Law of Trusts, § 2, p. 6.

"The settlor of a trust is the person who intentionally causes the trust to come into existence. The trustee is the person who holds the title for the benefit of another. The trust property is the thing, real or personal, the title to which the trustee holds, subject to the rights of another. The cestui que trust is the person for whose benefit the trust property is held or used by the trustee." Bogert on Trusts, § 1, p. 1. The cestui que trust is also called the "beneficiary."

their creation trusts are either: (1) express trusts, those created by the direct and positive acts of the parties; or, (2) implied trusts or those which, without being expressed, are created by implication.

The language relied upon for the creation of an express trust must (a) manifest an intent that an express trust arise, and (b) describe with certainty and completeness the trust essentials. In England, prior to the Statute of Frauds,[36] trusts of real and personal property required no writing for their creation, but the seventh section of that statute required express trusts of real property to be "manifested and proved" by a writing signed by the party enabled to declare the trust, and most of the states have enacted similar statutes although with many minor variations. However, in a few jurisdictions, parol trusts in land are allowed.[37]

Implied trusts are divided into (a) resulting trusts, and (b) constructive trusts. The former are trusts which arise by implication of law for the purpose of carrying out the presumed intention of the parties, and are subdivided into: (1) those where the grantor conveys only the legal estate; (2) those where the object of the trust fails in whole or in part, or is not declared; and, (3) those where a conveyance is taken in the name of another than the one paying the consideration. Constructive trusts, (the second class of implied trusts), differ from resulting trusts in that they arise entirely by construction of equity for the purpose of promoting justice or frustrating fraud, independently of any actual or presumed intention of the parties and often contrary to their intention.

Trusts are classified according to their purposes as, "(a) Private or public; and, (b) Active or passive. A private trust is a trust for the benefit of a known, defined individual or individuals. A charitable or public trust is a trust in which unascertained, indefinite persons, to be selected by the trustee from the whole world or from a certain class, are the beneficiaries. An active trust is a trust in which the trustee has affirmative duties of management and administration to perform. A passive trust is one in which the trustee is a mere receptacle of the legal title and has no affirmative duties toward the cestui que trust."[38]

Time of Enjoyment; Present and Future Interests

As to the time of their enjoyment, interests or estates in land are either: (1) present interests, "estates in possession"; or, (2)

36 29 Car. II, c. 3, 1676.

37 See Bogert on Trusts, pp. 44–64.

38 Bogert on Trusts, § 44, p. 152.

future interests, "estates in expectancy." Present interests, or estates in possession, are those which entitle their owners to the immediate possession of the land; whereas a future interest or estate is an estate limited to commence in possession in the future, either upon the termination of a precedent estate created at the same time, or without any precedent estate.[39]

Same; Future Interests

Future interests may be classified as follows: (1) reversions; (2) remainders; (3) those arising under the State of Uses; and, (4) those arising under the Statute of Wills.

A reversion is the residue of his estate which remains in a grantor (the "reversioner") after he has granted a lesser estate to another, the estate granted being termed the "particular estate." The grantor's reversion commences in possession when the particular estate terminates. For example, if A, having a fee simple estate in Blackacre, conveys Blackacre "to B for life," the interest in Blackacre remaining in A, that is the residue of his fee simple, is a reversion, and upon the termination of B's estate A will again be entitled to the possession or enjoyment of Blackacre. For the duration of B's estate, A has a "future" interest. Thus, there may be a reversion after the conveyance of any estate except a fee simple.[40]

A remainder is "a remnant of an estate in land, depending upon a preceding particular estate created by the same instrument, and limited to arise immediately on the termination of the preceding estate, but not in abridgment of it." [41] Remainders are either: (1) vested; or, (2) contingent.[42] A vested remainder

39 For definitions and the classification of future interests contained in the Restatement, see §§ 153–158, pp. 520–567, of that work.

40 However, after the conveyance of a fee on condition subsequent, or the creation of a qualified fee, there is obviously a contingent, future interest remaining in the grantor. This interest is called a "possibility of reverter."

41 Burdick, § 141, p. 348.

42 For example, if A, owning Blackacre in fee simple, should grant Blackacre to B for life, remainder to C and his heirs, the interest of C would be a remainder, and as C is a definite person, and as no conditions are attached to his interest, such remainder would be a vested one. However, if A had granted Blackacre to B for life, remainder to C, provided C marry D, C's remainder being dependent upon his marrying D, would be a contingent one.

Remainders are also classified as "successive," "cross," or "alternate." Thus, a remainder limited to take effect after another, is termed a "successive remainder." For example, there may be an estate granted to A

is one where neither the right to the possession of the estate upon the determination of the preceding estate, nor the person entitled to it, is uncertain; the only uncertainty being the time of enjoyment. A contingent remainder, on the other hand, is one where there is an uncertainty, either as to the right to the estate or as to the person entitled to it, or both. Such a remainder depends upon an event or condition which may never happen or be performed, or which may not happen or be performed until after the termination of the preceding estate.[43]

Shelley's Case

The "rule in Shelley's Case," was set forth in the action of Wolfe v. Shelley,[44] in which it was held, "It is a rule of law when the ancestor by any gift of conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee or in tail, that always in such case 'the heirs' are words of limitation of the estate, and not words of purchase." In other words the ancestor takes an estate in fee simple or in tail, according to the case; a word of "limitation" being a word that limits or defines an estate, that measures its duration; words of "purchase" being words denoting the manner in which an estate is acquired as distinguished from descent. The word "purchase" in its legal sense includes every method of coming into an estate other than by descent.

for life, with remainder to B for life, with remainder to C for life. "Cross remainders," are remainders after two or more particular estates in different persons, and which, upon the termination of any one of the preceding estates, go over to the survivor of the particular tenants. Thus, if Blackacre is given to A and B in common for life, remainder in fee to the survivor; or a devise of Blackacre is made to A, and of Whiteacre to B, in tail, and if either dies without issue the survivor to take; in either case A and B have cross-remainders. "Alternate remainders," on the other hand, are those so limited after a particular estate that only one of them can ever take effect. For example, if Blackacre were given to A for life, and if he have issue male, then to such issue male and his heirs forever, but, if he die without issue male, then to B and his heirs forever, the remainders created would be alternate. Only one could take effect, the other would be void. Necessarily, alternate remainders are both contingent.

43 "At common law, contingent remainders may be destroyed: (a) By the expiration of the particular estate before the remainder vests. (b) By the destruction of the particular estate. (c) By merger of the particular estate and the next vested remainder. (d) By forfeiture of the particular estate." Burdick, § 148, p. 364. However, in many of the states the liability of contingent remainders to destruction has been removed by statutes.

44 1 Co. Rep. 93b, 1581.

Thus, under the rule of Shelley's case, the word "heirs" defines the quantity of the estate given to the grantee or devisee, and the heirs of the grantee or devisee do not take any estate at all by the grant or will. The "rule" has been abolished by statute in some States, is in force in others.

Statute of Uses; Future Interests

Future interests or estates arising under the Statute of Uses are: (1) uses taking effect as remainders; (2) springing uses; and, (3) shifting uses. Remainders, at common law, required a preceding estate and had to arise without an abridgment of such preceding estate. "Equity, however, never recognized such requirements, and future uses could be created which would spring into existence without any preceding estate, or which would defeat or cut short a preceding estate." [45] And, as the Statute of Uses did not terminate the creation of uses but merely converted them into legal estates, future uses having preceding particular estates to support them may take effect as either vested or contingent common-law remainders, according to the circumstances.[46]

Springing uses are future uses which take effect without the support of preceding estates. Such a use receives its name from the fact that "it springs up as a separate and independent interest in lands, cutting short no preceding use. A limitation to the use of B and his heirs after the death of A, or a limitation to A in fee for the use of B in fee after ten years, are examples of springing uses." [47] Shifting uses, on the other hand, are future uses which take effect in derogation of a preceding estate. "When a future use, not limited by way of remainder, defeats a previous estate expressly limited by the same instrument, it is called a 'shifting use.' The use is said to shift from the first taker to the second. For this reason, shifting uses are also called 'secondary uses.' A limitation, for example, to the use of A for life, and if B shall marry before a specified date, then to the use of B for life, is an illustration of a shifting use. The estate which B takes upon his marriage shifts from A to B, and cuts off the preceding estate in A." [48]

45 Burdick, p. 372.

46 A future use taking effect as a common-law remainder "must have a preceding particular estate to support it, and must not take effect in derogation of that estate. If these requisites fail, the limitation will take effect as a springing or shifting use." Burdick, p. 373.

47 Burdick, § 152, p. 374.

48 Burdick, § 153, pp. 374, 375.

Statute of Wills; Future Interests

Executory devises are future estates created by devise under the Statute of Wills [49] and which cannot take effect as common-law remainders. "Prior to the establishment of tenure in England, under the feudal system, lands were devisable, but after that time until the time of Henry VIII they were not. However, during this interval, owing to the distinction made in equity between the legal estate in land and the use in land, * * * a man might by will dispose of the use or profits of the land, although he could not dispose of the land itself. The statute of uses, however, which was enacted in 1535, prohibited this method of practically alienating by will the land itself under the guise of devising the uses and profits of the land. This put a stop to 'wills of uses,' but the inconvenience produced was so great that it led, five years later (1540), to the enactment of the statute of wills. By the very liberal provisions of this statute, it was possible to create any future interest in realty which could be created by means of uses before the statute of uses." [50]

Although executory devises are created by will only, "they do not take effect at the testator's death, as in case of an ordinary devise, but arise and vest upon some future event or contingency. They consist of such interests created by will as would be called springing and shifting uses if created inter vivos by way of use. They are not future uses, however, since a future use limited in a will is not construed as an executory devise, but will amount to a legal estate under the operation of the statute of uses." [51]

Rule Against Perpetuities

The right to create future interests in land is restrained by the rule against perpetuities. This rule has been stated as follows: "Unless otherwise provided by statute, no future contingent and indestructible interest in property can, in general, be created

[49] 32 Hen. VIII, c. 1, 1540.

[50] Burdick, p. 375.

[51] Burdick, p. 376.

Wills may create future interests in the nature of springing or shifting uses, and these are called, respectively, "springing" and "shifting" devises. An executory devise is a "springing devise" when it has no preceding estate of freehold to support it, or where there is an interval between the termination of a preceding estate and the vesting in possession of the executory interest. An executory devise is a "shifting devise" when it is so limited that it does not wait for the natural determination of a preceding estate, as in the case of a remainder, but takes effect upon the happening of some event which cuts short the preceding estate.

which must not necessarily vest within twenty-one years, exclusive of periods of gestation, after lives in being." [52] As established by the English courts, the rule against perpetuities has been adopted in many of the states as part of the common law, but other states have either adopted or changed the rule by statute.

Number of Owners of Estates; Estates in Severalty and Joint Estates

According to their exclusiveness, that is the number of their owners, estates are either: (1) estates in severalty; or, (2) joint estates. An estate in severalty is an estate which is owned by one person only; whereas a joint estate is an estate which is owned by two or more persons. Joint estates, at common law, subdivide into: (a) joint tenancies; (b) estates in coparcenary; (d) estates in entirety; and, (d) tenancies in common.

A joint tenancy "is an ownership of land in equal undivided shares by virtue of a grant or a devise which imports an intention that the tenants shall hold one and the same estate. The interests of all the tenants go to the last survivor. For the existence of a joint tenancy the following unities are necessary: (a) Unity of interest. (b) Unity of title. (c) Unity of time. (d) Unity of possession." [53] The chief characteristic of a joint tenancy is the right of survivorship. Thus, where such a tenancy exists, either at common law or by force of statute, and one of the joint tenants dies, his interest does not pass to his heirs, but the survivors take the whole estate, and this doctrine of survivorship applies, where there are several joint tenants, until only one joint tenant remains, and on his death his heirs get the whole estate. In most states, common-law joint tenancies have been modified or abolished by statute.

An estate in coparcenary is a joint ownership of land in undivided shares by coheirs. The requisites of such an estate are: (a) unity of interest; (b) unity of title; and, (c) unity of pos-

[52] Burdick, § 161, p. 386.

[53] Burdick, § 101, p. 250.

Unity of interest means a similarity of estate in each joint tenant in reference to the duration of the estate. Unity of title means of the same grant or devise, that is, that the interest of each joint tenant was created by the same act. Unity of time means that the interests of joint tenants commence or vest at the same time. And, unity of possession means a joint right in each tenant to possession. However, in a joint tenancy "each tenant must have the entire possession of every parcel of the property as well as of the whole." Burdick, p. 253.

session. The doctrine of survivorship characteristic of joint tenancies is inapplicable. Estates in coparcenary are practically abolished in the United States, being replaced by tenancies in common.

An estate in entirety is one conveyed to a man and his wife to hold jointly. At common law, owing to the doctrine of identity of husband and wife, a conveyance or devise of lands to them during coverture creates an estate in entirety and the doctrine of survivorship applies to such an estate. In England, and in some of the states, statutes have abolished estates in entirety. In other states statutes expressly provide that joint conveyances to husband and wife shall create tenancies in common.[54]

A tenancy in common is a joint ownership of lands to which the principle of survivorship is inapplicable. The only unity necessary for such a tenancy is that of possession. At the present time, "tenancies in common may arise by will, conveyance, descent, mortgage, prescription, or by levy of execution. The individual interests may be held by several and distinct titles, and these titles may be acquired in different ways."[55]

Mortgages and Other Liens upon Realty

The definition of a mortgage upon real property depends upon the theory of its nature. "In this country there are two well-recognized theories regarding mortgages. One is known as the common-law, or legal, or title theory; the other, as the equitable or lien theory. (a) The common-law theory regards a mortgage as an estate in land created by a conveyance, and the mortgagee as the owner of the land. It is an estate upon condition subsequent. (b) The equitable or lien theory regards a mortgage as a mere security for a debt, and the mortgagee as having only a lien. The title remains in the mortgagor." [56]

[54] In some states the doctrine of "community property" applies to married persons. "The general principle underlying the system of community property is that all property acquired during marriage, by the industry and labor of either the husband or the wife, or both, together with the produce and increase thereof, belongs beneficially to both during the continuance of the marital relation. * * * Community property is of two kinds, legal and conventional. The legal community is fixed by law; the conventional community results from express agreement of the parties." Burdick, pp. 277, 278. The creation and incidents of this form of joint ownership are governed by the local statutes.

[55] Burdick, p. 260.

[56] Burdick, § 184, p. 458.

A "lien" is defined as, "a hold or claim which one person has upon the property of another as a security for some debt or charge"; "a charge imposed upon specific property, by which it is made security for the performance of an act." Black's Law Dictionary, 3d Ed. p. 1114.

The person who gives a mortgage is called the "mortgagor"; the person to whom a mortgage is given is called the "mortgagee."

[57] Burdick, § 213, p. 567.

Generally the estate which the mortgagee is regarded as having under the common-law or title theory may be defeated upon performance by the mortgagor of his obligation, within the time stipulated in the deed. Usually this obligation of the mortgagor is the payment of a debt. However, if the mortgagor fails to perform within the time agreed the mortgagee's estate becomes absolute. In most of the states, either by statute or judicial decision, the common-law title theory of mortgages has been abrogated and the lien theory adopted.

Under the equitable or lien theory, followed by the English court of equity, a mortgage is regarded as merely security for the debt or other condition which is to be paid or performed by the mortgagor, title is regarded as in the mortgagor, and the mortgagee is considered as having only a lien on the land. The equity courts also recognized a right in the mortgagor to redeem the land, upon payment of the amount due with interest, although he failed to perform within the stipulated period, such right being termed the "equity of redemption." Originally, after the right of redemption arose, a mortgagor was permitted to redeem at any time, but later the mortgagee was permitted to file a bill in equity for the purpose of cutting off this right. At the present time in many of the states, and in distinction from the equity of redemption which could be cut off or foreclosed by the mortgagee, a right of redemption is given the mortgagor by statute which arises when the mortgage is foreclosed. And, generally, these statutes limit the period in which such right may be exercised.

Mechanics' liens, judgment liens, and various other miscellaneous liens against land are also recognized. "Mechanics liens are liens created by statute for the purpose of securing to mechanics, materialmen, and contractors a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure." [57] The procedure for the enforcement of such liens varies with the different statutes, but usually they provide a means whereby property subject to a lien may be sold for the satisfaction of the claim for which the lien is allowed. At common law the lands of a debtor were not

liable for his debts and a judgment against a debtor was not a lien upon his real property, consequently "a judgment lien is created only by statute. It is not an interest or estate in land, but merely a right, superior to all subsequent claims, liens, incumbrances, or conveyances, to subject the interest or estate of the judgment debtor in the land to the satisfaction of the judgment debt." [58]

In addition to mortgage liens, mechanics' liens, and judgment liens, real property may be subject to other miscellaneous liens arising from taxes, assessments for public improvements, crop claims and the like. As to their origin, such miscellaneous liens or charges are either equitable or statutory.

TITLES

71. The word "title" is used in two senses which denote:

(1) Ownership, or when appropriately limited, a claim of ownership, and

(2) The operative facts which result in ownership, or which constitute the base of a claim of ownership.

In General

As used in reference to ownership of both real and personal property the word "title" may denote either the means by which property is acquired, or the means by which it is held. Thus, in the law of real property, title may be defined either as the means by which an estate in land is held; or the means by which an estate in land is acquired. In other words, the term title may be used to denote either the operative facts which result in the ownership of an estate, or such result. When found, the precise meaning of the term must be ascertained from the context.

Title by Descent and Title by Purchase

The acquisition by a person of title to an estate in land is either by descent or by purchase. Title by descent is that title which is acquired by an heir to the estate of his intestate, or ancestor dying without will. A title which results by operation of law, rather than by act of the parties.[59] Titles by purchase include all forms of ownership other than that form of ownership which is acquired by descent. In other words, titles by purchase

[58] Burdick, § 214, p. 576.

[59] Title by descent is treated of in c. 16, infra.

include all titles but title by descent, the term "purchase" meaning more than merely "to buy." Hence, titles by purchase include, in general, not only titles which result from the buying of land or goods, but also titles which result from the wills of deceased persons, and various other titles which result from the operation of law.

Classification of Titles by Purchase

Titles by purchase may be acquired in two ways: (1) by operation of law; and, (2) by alienation. A title by purchase from operation of law is such a title as may be acquired by the action of some legal principle, without an act on the part of any person. A title by alienation, on the other hand, is a title which is acquired as the result of an act on the part of one or more persons.

Titles by Operation of Law

A title by operation of law may be obtained in the following different ways: (1) by escheat; (2) by accretion; (3) by abandonment; (4) by forfeiture; (5) by prescription; (6) by adverse possession; (7) by marriage; or, (8) by bankruptcy. Such titles result from transfers effectuated by the operation of legal principles alone and do not include transfers executed by governmental agents; thus, a title obtained at a sale of land for nonpayment of taxes would not be a title by operation of law, but rather a title by alienation.

Same; Escheat

At the present time, the rule generally prevailing is that when a person dies intestate and without heirs his realty goes to the state. Thus, title by escheat is that which the state acquires when the owner of realty dies intestate and without heirs. The term escheat (from the French word "eschoir" meaning "to happen") was also applied under the feudal system to the reverting of an estate back to the feudal lord when his tenant died without heirs.

Same; Accretion

Title by accretion is that which is acquired by the owner of lands in such additional soil as is added to it by natural forces. Such title results where sand or soil by the action of water is gradually deposited on riparian lands.[60] New land thus formed

[60] "When land is suddenly and forcibly removed from a riparian owner by an inundation or current, or by a sudden change in the course

belongs to the riparian owner on whose land the deposit is formed. Accretion is a phase of accession, but accession is a broader term and includes various other modes of acquisition whereby the owner of corporeal property becomes the owner of an addition to his property by growth, increase, or labor.

Same; Abandonment

Title by abandonment is that which the owner of the legal estate in land may acquire when an incorporeal hereditament, equitable estate, or executory interest in such land is given up. The effect of the abandonment of such rights or interests is to release the land from them. However, mere nonuser is ordinarily not sufficient to produce this effect; there must be some act of abandonment.

Same; Forfeiture

Title by forfeiture is that which may be acquired by the grantor of an estate subject to a condition subsequent, upon the breach of such condition by the grantee. In such a case a reentry by the grantor is usually required, and unless he re-enters within proper time the breach of condition may be considered as waived.

Same; Prescription

Title by prescription is that which may be acquired in an incorporeal hereditament by one who uses it adversely for a certain period. The characteristic of title by prescription is that after a certain time during which the incorporeal hereditament is in use by a particular person, he is presumed to have obtained the right to it originally by grant. Thus, easements may be acquired by prescription if the adverse user is continued for the time required by the applicable statute of limitations.

of waters, so that a considerable portion is thus perceptibly transferred from one owner and deposited upon the land of another owner, the process is known as avulsion. To constitute accretion, however, there must be an imperceptible action of the water, a momentarily insensible addition of matter. In other words, it is a gradual process as distinguished from a sudden change. When accretion takes place, and the particles of the soil of one owner are gradually worn away and deposited upon the land of another, the title is held to pass to the latter, because the soil so deposited cannot be identified by its former owner. When, however, a sudden change, or avulsion, transfers a considerable portion of soil from one owner and deposits it upon the land of another, title does not pass to the latter if the soil so transferred is removed within a reasonable time, and while it can be identified." Burdick, pp. 599, 600.

Same; Adverse Possession

Title by adverse possession, or disseisin, is that which is acquired in lands by one who has occupied them adversely for a certain time. "In order, however, that a disseisor may acquire title by adverse possession, the following general conditions must be fulfilled: (a) The possession must be actual. (b) It must be visible or notorious. (c) It must be hostile or adverse. (d) It must be exclusive. (e) It must be continuous by one person or by persons in privity. (f) It must be continued for the whole period required by the statute of limitations." [61] As a rule, title acquired by adverse possession is to an estate in fee simple and is as perfect as if granted by deed of the former owner; and when title by adverse possession has been acquired it continues as any other title until disposed of by conveyance, or until lost by a subsequent adverse possession. Adverse possession is somewhat similar to prescription, but the two differ in that by adverse possession title is obtained to corporeal property and no grant is presumed.

Same; Marriage

Title by marriage is that which either husband or wife acquires in the real property of the other by virtue of their relationship. Thus, estates in dower and by curtesy are held by such title.

Same; Bankruptcy

The trustee of the estate of a bankrupt, upon his appointment and qualification, is vested by operation of law with the title of the bankrupt in the nonexempt property of the bankrupt. Such title vests as of the date of the filing of the petition in bankruptcy.

Title by Alienation; Involuntary Alienation

Title by alienation may be by either (1) involuntary alienation, or (2) voluntary alienation. Title by involuntary alienation is that which is acquired from the act of some one other than the former owner of the property. Title by voluntary alienation is that which is acquired from the act of the former owner of the realty either with or without the concurrent act of some other person. The principal forms of title by involuntary alienation are: (a) title by execution; (b) title by judicial decree; (c) title by eminent domain; and (d) tax titles.

61 Burdick, § 229, p. 629.

Same; Execution

Title by execution is that title to property which is acquired when such property is sold to satisfy the judgment of a court of law. At common law, "a man's lands were not liable to be sold for his debts. Now, however, in all of our states, lands may be sold for debts. Before this can be done, however, a judgment must be obtained, and a writ of execution must be issued. The sheriff or his deputy thereupon makes the sale and executes the deed. The purchaser is said to take an estate on execution, acquiring by the purchase only the interest of the judgment debtor. The statutes usually provide that the debtor may redeem the land from the sale within a certain specified time." [62] The titles which result from such sales are titles by execution.

Same; Judicial Decree

A title by judicial order or decree is a title which results from a judicial sale made under the process of a court having competent authority to make such order or decree, by officers legally appointed and commissioned to make such sale. Title by judicial decree is to be distinguished from title by execution as there is a well-defined difference between an execution sale and a judicial sale. "In an execution sale, the sheriff, or his deputy, or other authorized officer, sells by the mere authority of his writ, and if the sale is not void, the title passes at once by the sheriff's deed. In some states, a judicial confirmation of an execution sale may be required by statute, but it is not so at common law. At common law, confirmation is required only in judicial sales. An execution sale is based on a general judgment for money; a judicial sale is based on an order to sell specific property. * * * In an execution sale, the sale is made by the sheriff; in a judicial sale, the sale is made by the court." [63]

Same; Eminent Domain

Eminent domain is defined as "the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn and take private property for public use upon paying the owner a due compensation, to be ascertained according to law." [64] Title to property acquired as a result of the exercise of

[62] Burdick, pp. 676, 677.

[63] Burdick, pp. 676–678.

[64] See People ex rel. Trombley v. Humphrey, 23 Mich. 471, 474, 9 Am. Rep. 94, 1871; Hale v. Lawrence, 21 N.J.L. 714, 728, 47 Am.Dec. 190, 1848; West River Bridge Co. v. Dix, 6 How. 507, 536, 12 L.Ed. 535, 1848.

such power is title by eminent domain. The right of the nation and of the states to take private property for public use, upon the payment of just compensation, is recognized by the federal and state constitutions. However, the power to condemn lands under the right of eminent domain "may be delegated to corporations, public or private, and even to individuals, providing such corporations or individuals are exercising some public function, and the property is taken for the benefit of the general public. No exact definition can be given of what constitutes a 'public use,' since each case must depend upon local needs and conditions. The question, however, is one of law, and is for the courts to decide in any disputed case." [65]

Same; Tax Titles

A tax title is that which is acquired by the purchaser of land sold by a public officer for the nonpayment of taxes assessed against such land. "Such a sale may be either: (a) A ministerial sale; or (b) A judicial sale. When land is sold for delinquent taxes under a judicial sale, the action may be: (a) In personam, or against the delinquent taxpayer; or it may be a proceeding (b) In rem, that is against the land itself. In almost all the states the statutes provide that land sold for taxes may be redeemed during a certain period from the time of sale, or before the delivery of the tax deed. In most states, the estate acquired by a tax title is a fee simple. In some states, however, the purchaser acquires only the same interest the delinquent taxpayer had. In a few states, a forfeiture of land is incurred for nonpayment of taxes, and title to the land becomes vested in the state." [66]

Title by Voluntary Alienation; Devise and Grant

Title by voluntary alienation may be acquired in two general ways: (1) by devise; and, (2) by grant. Title by devise is that title to realty which is acquired by the will of a testator. Title by grant is that which is acquired by formal conveyance of realty from one called the grantor to another called the grantee. Title by grant may be acquired in two ways: (a) by public grant or patent; and, (b) by private grant or deed.

Same; Public Grant

Title by public grant is that which is acquired in lands previously owned by the government, as the result of a formal con-

[65] Burdick, pp. 690, 691.

[66] Burdick, §§ 248–250, p. 682.

veyance executed by the proper officers to a private person. Conveyance by way of public grant is usually made by an instrument termed a "patent," and individuals may acquire titles to realty in this way from both the federal and state governments.

A nation may acquire lands by (1) discovery, occupation, conquest, or cession; as well as by (2) grant, eminent domain, confiscation, or escheat.[67] However, the several states of the Union can acquire lands only by the methods listed in the latter group, the methods listed in the former group being exclusively within the prerogative of the nation.

The acquisition of land by a nation may be considered either from the viewpoint of international law, or of private law. The former refers more appropriately to the acquisition of territorial jurisdiction; the latter, to the acquisition of land as a private owner. The most usual methods of acquiring territorial jurisdiction on the part of a nation are discovery, occupation, conquest, and cession; but to these may be added, for particular cases, prescription and accretion.[68] In earlier times nations claimed jurisdiction to lands by the right of discovery alone, but so much controversy was raised by this doctrine it became the established principle later that occupation must follow discovery for the attainment of a recognized right to jurisdiction.

Title by conquest is said to result when the territory of a nation has been held for so long by an enemy nation in military occupation that such territory is regarded in international law as having come under the permanent jurisdiction of the occupant. At the termination of hostilities lands claimed by conquest may be ceded in the treaty of peace. Title by cession, on the other hand, may arise by gift, exchange, or by sale, the latter mode being the most common.

[67] "At common law, persons attainted of treason and felony were subject to the forfeiture of their lands to the crown. While this part of the common law has not been recognized in the United States, yet acts known as 'Confiscation Acts' have, at various times, been passed by Congress. Under the act of 1861, [Aug. 6, 1861, c. 60, 12 Stat. 319] land used for insurrectionary purposes with the consent of the owner was subject to forfeiture, and could be sold." Burdick, p. 588.

[68] "Title by prescription is seldom asserted. It has arisen, however, at times, where the territorial rights of nations have been recognized from the fact of long-continued possession of certain lands. Title by accretion may also be applied to national rights in connection with changes in the boundary lines between nations. The principles governing title in such cases are the same as apply to private titles." Burdick, p. 586.

The original title to lands on this continent was acquired by various European nations through discovery and occupation, the Indians, like other uncivilized peoples, not being regarded under international law as having territorial jurisdiction. However, they have been admitted to be "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, though not to dispose of the soil of their own will, except to the government claiming the right of pre-emption. * * * The United States adopted the same principle, and their exclusive right to extinguish the Indian title by purchase or conquest, and to grant the soil, and exercise such a degree of sovereignty as circumstances required, has never been questioned." [69]

England acquired titles to the land within the limits of the original American colonies partly by discovery and partly by conquest and cessation; but these crown rights were conveyed to certain proprietors and corporations, although in different ways and degrees. In those colonies which were not proprietary the crown retained the right to the soil but granted lands therein. However, in the proprietary colonies, title to the soil was vested by the royal grant in the proprietors and they in turn disposed of the lands at their pleasure. The proprietors also, in many instances, purchased the rights of the Indians, but such transactions were held to merely release the rights of the grantors, not to convey the freehold. Private persons were, in the main, prohibited from buying lands from the Indians without the authority of the colonial government having jurisdiction thereof.[70]

The rights of the crown of Great Britain "passed as a result of the Revolutionary War to the states, and the thirteen original states, upon achieving their independence, became the owners of the land within their borders not previously disposed of to private owners. When new states were created out of the original domains of the older states, such new states, in turn, became vested with the title of the vacant lands within their borders. The ownership by the United States of lands within the territorial jurisdictions of all these states was acquired by cession from the individual states. The territorial jurisdiction of the United States has been vastly increased, however, * * * by various purchases. The title to all unoccupied lands in such ceded territory became vested, consequently, in the United States, as

[69] 3 Kent Comm. 379, 380; Martin v. Waddell, 16 Pet. 367, 10 L.Ed. 997, 1842; Fletcher v. Peck, 6 Cranch 87, 3 L.Ed. 162, 1810.

[70] See Burdick, pp. 585–587.

was not true in the case of the original states, and of new states carved out of their territory. When, however, new states were formed out of the lands purchased from other nations, the title to the land in such states, not owned by private persons, remained in the United States, and formed the bulk of the once vast domain of the public lands of the United States." [71]

Lands owned by the United States or by a state and intended for sale and settlement, are generally known as "public lands." The legal title to national public lands is vested in the United States, and the power to dispose of such lands is vested in Congress. However, the sale of the national public lands has, by statute, been placed under the control of the secretary of the interior; and statutes also provide that there shall be in the department of the interior a commissioner of a general land office who shall perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government.[72]

The usual method of conveying lands by public grant is a patent, and, as a general rule, the issuance of a patent in the name of the United States is necessary to pass title in public lands to a private owner. Patents are signed in the name of the President and affixed with the seal of the general land office.[73] A patent is the highest evidence of title.[74]

Same; Private Grant

Title by private grant is that which is acquired in realty previously owned by a private person, by virtue of a deed of conveyance. A "deed," in the widest sense of the term, is a contract under seal, and in this sense it is synonymous with the terms "covenant" and "specialty." However, in the law of real property the term "deed" is used in a narrower sense to signify an instrument, usually under seal, by which an estate in land is granted by one private person to another private person or to the state, or whereby an estate already thus granted is enlarged or modified.[75]

[71] Burdick, p. 587.

[72] See 43 U.S.C.A. §§ 1, 2.

[73] See 43 U.S.C.A. §§ 6–9.

[74] "Using the term 'grant' to designate a private conveyance, in distinction from the term 'cession,' which technically applies to the ceding of territory by a nation, either the United States or a state may acquire land from private persons by any of the modes of conveyance which operate between individuals. In the same way, a state may convey land to the United States, or the United States to a state." Burdick, p. 587. When the federal government has granted lands to a state the authority of Congress over such lands is terminated.

Same; Common-Law Deeds

Deeds are classified as original (or primary) deeds, or as derivative (or secondary) deeds; an original deed being one which creates an estate, a derivative deed being one which enlarges or modifies an estate already created. At common law there were six principal kinds of original or primary deeds: (1) feoffment; (2) gift; (3) grant; (4) lease; (5) exchange; and, (6) partition. A feoffment was a deed which created a fee-simple estate. It was accompanied by livery of seisin, or the actual corporeal delivery of the property. A gift, as a conveyance, was a deed creating a fee-tail estate. A grant, in this sense, was a conveyance of the title to an incorporeal hereditament. A lease was the conveyance of an estate less than that held by the grantor; as where one holding an estate in fee granted to another an estate for years in the property. An exchange was a deed transferring equal interests, one in consideration for the other; but it was the interests or estates that had to be "equal," as fee simple for fee simple, not the values of the properties. A partition was a deed creating several estates out of estate in joint tenancy or in common.

The common-law derivative or secondary deeds were five: (1) release; (2) confirmation; (3) surrender; (4) assignment; and, (5) defeasance. A release was the conveyance of an expectant interest in property to one having the estate in possession; as, for example, the transfer of the remainder or reversion to the particular tenant. A confirmation was a deed confirming or making valid a voidable estate. A surrender was a conveyance of the estate in possession to one holding the estate in expectancy, the counterpart of a release. An assignment was a transfer to another of one's entire interest in property. These were usually confined to estates for life or years. A defeasance

[75] "A definition frequently employed in modern times is that a deed is a writing sealed and delivered. At common law, the word 'deed' implies a sealed instrument, although under modern statutes a seal may be no longer required. A deed did not have to be signed, however, prior to the statute of frauds [1676]." Burdick, p. 743.

was a collateral deed which provided conditions whereby the estate created by another deed could be defeated.

Under the Statute of Uses five new forms of deed arose: (1) covenant to stand seised to uses; (2) bargain and sale of lands; (3) lease and release; (4) deed to declare uses; and, (5) deed of revocation of uses. A covenant to stand seised of uses was a deed by which a man covenanted or agreed to hold the property to the use of some kinsman, in consideration of blood or marriage. This operated to vest the equitable estate in the relative and by the operation of the Statute of Uses the legal estate also vested. In a bargain and sale the grantor merely agreed with another that he would convey to him certain property. Courts of equity would then hold the covenantor to be a trustee for the other, and the legal title would also vest in him by reason of the statute. A lease and release did not depend for its effect upon the Statute of Uses, but was adopted soon after the passage of that act. The purpose of a lease and release was to avoid the Statute of Enrollments which required conveyances by bargain and sale to be made by deed indented, and also enrolled, in order for such conveyances to operate under the Statutes of Uses as conveyances of legal estates. The "lease and release" was consequently devised which operated in this way: A lease for a term, usually for one year, was given to the intended grantee. This lease was not required to be enrolled because the statute did not apply to chattel interests. Then, by a release usually dated as of the day after the date of the lease, the reversion of the estate was "released" or conveyed to the lessee who thus acquired full interest in the land without the use of any conveyance which had to be enrolled. A deed to declare the uses of other conveyances was, as its name implies, one specifying the use to which property conveyed by some other form of deed was to be held, whereas a deed of revocation of uses was one used to revoke a use when the power to so revoke had been reserved.

Same; Modern Conveyances

Modern conveyances may be classified as: (1) warranty deeds; (2) quitclaim deeds; and, (3) statutory deeds. The forms of conveyance most frequently used in the United States at the present time are warranty deeds and quitclaim deeds; evolutions of the common-law conveyances. As a matter of fact, the deed in common use at the present time is the deed of bargain and sale, and the modern warranty deed is nothing more than a conveyance containing a covenant of warranty which, by common understanding, has come to mean a deed that warrants good title.[76]

The modern quitclaim deed is derived from the common-law release. However, at common law a release was a derivative or secondary conveyance, but a quitclaim deed may in most states be used either as a primary or a secondary conveyance. Such a deed transfers only the title which the grantor has, but statutes in many of the states provide that a quitclaim deed shall operate to convey whatever right, title, and interest the grantor has in the land at the time of its execution and delivery.

In a number of states, short forms of deeds have been prescribed by statute which are declared sufficient to convey various estates in land, but common-law conveyances and conveyances operative under the Statute of Uses may still be used except where superseded or abolished by statute. At the present time, "the requisites of a valid deed of conveyance may be enumerated as follows: (a) A sufficient writing. (b) Competent parties. (c) Property to be conveyed. (d) Question of consideration. (e) Words sufficient to specify the conveyance. (f) Proper execution, including—1. Signing. 2. Sealing (in some states). 3. Attesting (in some states). 4. Acknowledgment (in some states). (g) Delivery and acceptance. (h) Recording, in some states." [77]

Some states have provided by statute, an optional system of title registration, in order to make the conveyance of land more simple. "The prevailing principles of this system are as follows: (a) The issuance of a certificate of title to the owner of land making application for such a certificate. (b) The creation of an indemnity fund to protect any person who may be injured by the operation of the statute. (c) The abolishment of title by adverse possession as to land duly registered. (d) The transfer of title only by the registrar acting under due authority." [78]

Such a system was introduced in Australia by Sir Robert Torrens in 1858, and consequently the similar plans adopted in various of the States are generally referred to as the "Australian Ti-

[76] Where a person without title executes a warranty deed, a title subsequently acquired by him will inure to the benefit of the vendee. In other words the vendor and those claiming under him will be estopped to deny it and the vendee is said to have acquired "title by estoppel." However, as a quitclaim deed transfers only such title as the grantor has, a grantor under a quitclaim deed is not prevented from setting up an after-acquired title.

[77] Burdick, § 282, p. 745.

[78] Burdick, § 226, p. 615.

tle System," or the "Torrens System." "The plan did not originate, however, in Australia. It is based upon the German Grundbuch System, which has been the law in some part of continental Europe for centuries. * * * While the statutes may vary more or less in details, the general outlines of the system are as follows: Any person, claiming to be the owner, who wishes his alleged title to land registered, files an application or petition in court, setting forth the alleged facts regarding his title, together with a statement as to any liens or incumbrances thereon. The petition is referred to examiners appointed by the court. The examiners report, in due time, their findings of fact as to the title, whereupon, after a hearing, to which all parties in interest are summoned, the court determines whether the title of the land shall be registered or recorded as prayed, and, if so recorded, a certificate of such title is issued to the holder of the record title. * * * After land has been registered, the usual deed is made, in case of a conveyance; but any of the ordinary forms of conveyance purporting to transfer the title operate only as contracts to convey, and as authority to the registrar to transfer the title. The transfer itself is usually effected by the surrender of the duplicate certificate of title and the issuing of a new certificate to the transferee. If only part of the owner's interest is transferred, another certificate is issued to him for the interest remaining in him. Transfers by descent, devise, or by judicial process are made by the registrar in accordance with the orders and decrees of the court." [79] For the protection of the system it is generally provided by statute that after land has been registered no title thereto, adverse or in derogation of the title of the registered owner, shall be acquired merely by any length of possession. In other words, generally, title to registered land cannot be acquired by adverse possession.

[79] Burdick, pp. 616, 617, 619.

CHAPTER 15

PERSONAL PROPERTY

IN GENERAL

72. Personal property includes all property rights which do not constitute realty.

Personalty includes all property rights except freehold interests in land. The word "chattel" is commonly used to denote either a personal property right or the object of such a right, as are the terms "personal property" and "personalty," but the term chattel is used more often to denote the object of a personal property right—the thing—rather than such a right. According to Blackstone the word "chattel" is derived from "the technical Latin word, *catalla,* which primarily signified cattle, but in its secondary sense, was applied to all movables. The Normans accounted all things not feuds, as chattels. And in this extended, negative sense, our law adopts it; the idea of goods or movables only, being not sufficiently comprehensive. Two requisites were required to constitute a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities, according to the Normans, was not a heritage or fief, hence it must be a personal estate or chattel."[1]

Generally it may be said that the objects of real property rights are immovable (lands), and that the objects of personal property rights are movable (chattels, or goods). However, this generality ignores the interests in land which are regarded as personalty, and the various things which may be immovable at one time but movable at another time. For example, the materials and equipment for buildings, crops and trees. Consequently, such things may be regarded differently, according to their movability at different times. Hence, the fixture doctrine and the doctrine of emblements.

[1] Browne's Blackstone's Commentaries, p. 346.

Fixtures

A fixture, as already indicated,[2] is a thing which, although previously movable, has lost this characteristic in such a way as to have become realty. It is a thing actually or constructively affixed to land, is regarded as belonging to the owner of the land to which it is annexed, and will pass by a deed conveying the land. However, things annexed to land do not always become realty. Thus, chattels placed by a tenant upon leased premises for the purpose of carrying on his business or trade are generally regarded as personal property. Such things are called "trade fixtures," and their removal is permitted with considerable freedom. "Closely allied to, and sometimes included within, the term of trade fixtures, are agricultural fixtures. These are annexations which are used in farming, and consist principally of barns, sheds, and farm machinery such as cotton gins. In England, agricultural fixtures are for the most part irremovable, but the rule is generally otherwise in the United States, although it is not as liberal as in the case of trade fixtures proper."[3] A third exception is made for "domestic" or "ornamental" articles added by a tenant to a leasehold for his greater convenience and enjoyment, and, as a rule, such things will not be held to have become a part of the realty unless it is shown that their annexation was intended to be permanent.

Emblements

Things growing on land are either: (1) natural products (fructus naturales); or, (2) annual crops (fructus industriales). "Everything growing upon the land, except annual crops, is realty. The annual crops, however, are, as a rule, personal property. The spontaneous or natural products of the land * * * such as trees, perennial grass, and perennial bushes, are regarded as a part of the soil, and pass with a conveyance of the land. Annual crops are the vegetable products of the earth, such as garden products, corn, grain, straw, hemp, hops, and nursery stock. Being produced annually, by labor and industry they are called 'fructus industriales' in distinction from 'fructus naturales.' * * * Emblements, in connection with the law of landlord and tenant, is a term used to describe such annual products, or fructus industriales, as have resulted from a tenant's care and labor. They are sometimes called the 'away-going crops,' or the crops that a tenant has the right to take away after his tenancy has ended.

[2] See § 48, supra.

[3] Burdick on Real Property, pp. 35, 36.

Whenever such crops are planted by one having an interest of uncertain duration in the land, and that interest terminates without his fault before the crops are harvested, he has a right to enter to cultivate, harvest, and remove them. This right is given on the principle that the crops are not planted with any intention to benefit the one next entitled to the land, but with the expectation of reaping them. No one, however, is entitled to emblements who has terminated his estate by his own act. The right to remove crops may be given in any case by express contract, and in some states the subject is regulated by statute."[4]

Things Severed from Land

Things constituting realty such as fructus naturales and fixtures may become personalty upon their severance from the land, if such is the intention of their owner. "Water; ice; metals; oil; gas; coal; natural or perennial products, including trees, rock, stone, and all other minerals; buildings and all other structures —in fact, all things, even the soil itself, which in their natural positions are parts of the land, may become personalty by severance. Manure generally is part of the soil, but it may be made personal property by severance. In case parts of the land are severed by accident, the rule is that the character of the property is not changed. Thus, trees blown down by the wind, or the fallen materials of a building destroyed by tempest or fire, remain realty. In the case of trees, however, it is held that the severance of them by one in possession, although having no right to sever them, or severance by even a trespasser, will change them into personal property. In order to change by severance real property into personal, the severance need not be an actual physical act, but may be constructive. For instance, trees and the like can be made personal property by conveying the land and reserving the trees, or by the owner selling the trees as they stand on the land. Likewise, a house may be sold with the understanding that it is to be removed. This is sufficient to make it personalty."[5]

Chattels Real and Personal

Chattels are of two classes: (1) chattels real; and, (2) chattels personal. A chattel real is an estate in land less than freehold; all other forms of personal property are chattels personal. The most important chattel real is the estate for years, but as

[4] Burdick on Real Property, pp. 17–19.

[5] Burdick on Real Property, pp. 19, 20.

such an estate is not of indefinite duration it lacks one of the two essential qualities of realty. Chattels personal, on the other hand, generally lack both the essential qualities of realty in that they are not immovable and are not of indeterminate duration.

Chattels personal are the most typical. Lacking the substantial character of real property they could not be held by tenure under the feudal system. However, chattels real also lacked the characteristic permanence of realty and did not come under the operation of the feudal rules which related to real property.

Chattels Personal; Classification

Chattels personal are classified as: (1) choses (things) in possession; and, (2) choses in action. According to Blackstone, "property in chattels personal may either be in possession, which is where a man has not only the right to enjoy, but has the actual enjoyment of the thing; or in action, where a man has only a bare right, without any occupation or enjoyment."[6]

Chattels personal are also classified according to the tangibility of the objects of personal property rights as: (1) corporeal; or, (2) incorporeal. Tangible objects of personal property rights are called corporeal chattels (choses in possession). Intangible objects of personal property rights are called incorporeal chattels (choses in action). Thus, domestic animals, things severed from land, ships, furniture, clothing and the like, are choses in possession or corporeal chattels; whereas debts, shares of corporate stock, bonds, patents and copyrights are examples of choses in action or incorporeal chattels.[7] Certain intangible personalty such as debts and shares of corporate stock may be evidenced by tangible things such as notes and certificates of stock, but they are classified as intangible by reason of the incorporeal quality of the rights they indicate.

Choses in possession or corporeal chattels, and choses in action or incorporeal chattels, are further distinguishable as follows: (1) Choses in possession were transferable by mere delivery of possession at common law; choses in action were not. Choses in possession may be actually delivered; choses in action may be only symbolically delivered. (3) Choses in possession were subject to larceny at common law; choses in action were not. (4) The husband, at common law, took the choses in possession of the wife absolutely; whereas his rights to her choses in action were qualified. (5) Choses in possession survive their owners; choses in action may not.

[6] Browne's Blackstone's Commentaries, p. 347.

[7] However, the terms corporeal and incorporeal are also used to denote rights as well as the things in which they inhere. Thus, the right which an owner has in a tangible chattel is called "corporeal personalty"; the right which an owner has in an intangible thing, "incorporeal personalty."

Ownership of Personalty

The word "estate," except in regard to chattels real, is not used to indicate the extent of a person's interest in personalty. Chattels are owned, not held of a superior, although they can of course be rented or bailed and hence a chattel can be in the lawful possession of one not its owner. However, the interests which a person may have in personalty are closely analogous to those which may be held in realty and the terms used to indicate the different quantities and qualities of ownership are the same as those applied to estates in land. Thus, under modern law, interests in personalty may be: (1) present or future, and future interests in chattels are subject to the rule against perpetuities; (2) several, joint, or in common; (3) for life, for years, or at will; and, (4) absolute or conditional.

Titles to Chattels; Classification

In the law of personal property as well as in that of realty, the term "title" is used in two senses: (1) to denote the manner in which ownership is acquired; or, (2) the manner in which ownership is held. Ownership of chattels may be acquired, and title to them held, in four general ways: (a) by original acquisition; (b) by operation of law; (c) by legal process; (d) by act of persons.

Same; By Original Acquisition

Title by original acquisition is subdivided into: (1) title by occupancy; (2) title by accession; and, (3) title by creation. Title by occupancy subdivides, in turn, into: (a) title by capture, of chattels taken in war; (b) title by finding, of lost chattels; (c) title by reclamation, of abandoned chattels; and (d) title by taking, of animals ferae naturae. Title by capture, at common law, vested in the taker of a chattel, whether by national authority or by voluntary, individual action, but in modern times title to chattels taken during war usually vests in the nation, and individual captors obtain whatever compensation or reward as may be provided by statute. Title by finding may vest in the discoverer of a lost chattel who reduces it to his possession, when

the former owner abandons any intention to reclaim, or when the running of the statute of limitations would bar the former owner from recovering the chattel by action. An abandoned chattel is one the possession of which has been relinquished by its former owner without any intention of reclaiming it; therefore, title by reclamation is that which is held by one who first reduces to possession an abandoned chattel. The term "title by occupancy" is also used to denote that which is held by one who first reduces animals ferae naturae (or wild animals) to his possession.

Title by accession, the second subdivision of title by original acquisition, is analogous to title by accretion in the law of real property. Thus, title by accession is that which is held by the owner of a chattel in the products of, and additions to, his chattel; whether such increase is produced naturally or added artificially. Title by accession also includes that which is held by the owner of land in chattels annexed to his premises in such ways as to have become fixtures. Under this doctrine, the owner of a female animal is entitled to her offspring; and the owner of an inanimate chattel is entitled to things, added thereto in such ways that the things added become integral parts of the original. Thus, if A has his automobile painted by B, the latter furnishing the material, A gets title to the paint as it is applied.

Title by confusion, often classified as one mode of accession, is distinguishable. Generally, accessions consist of additions to chattels of different goods or parts, whereas confusion, in law, is the result of similar goods being mixed. For example, if grain, logs, or cattle are so intermingled that their separate owners cannot identify them, the chattels are "confused." In this type of situation the rule is that if a person willfully and fraudulently intermingles his goods with goods of different quality belonging to another, and the different goods cannot be distinguished, the innocent owner acquires title to the whole. Hence, title by confusion.

Title by creation, (also called "title by intellectual labor"), the third subdivision of title by original acquisition, is that which is held by one who first produces a thing. For example, a person who conceives of and produces a novel mechanical device, or a design, or a person who originates and writes a literary or musical composition, holds title to his product by creation and he may obtain protection thereof by patent or copyright.

Same; By Operation of Law

Title by operation of law subdivides into: (1) title by forfeiture; (2) title by succession; (3) title by marriage; (4) title by adverse possession; (5) title by judgment; and, (6) title by bankruptcy. Title by forfeiture is that which is held by the government, a corporation, or a private individual, as the case may be, by reason of the former owner's loss of title as a punishment for crime, or penalty for a tort or breach of contract. Title by succession is that which is acquired and held by the government or an individual after the death of the previous owner.[8] Title by marriage is that which is acquired by virtue of marital status.[9] Title by adverse possession is that which is acquired in a chattel by one who has possessed it adversely for a certain time. Such title results by reason of the effect of statutes of limitation restricting the period in which suits may be instituted after causes of action arise. Thus, when the period in which an action may be brought for the recovery of a chattel has expired, the effect is to vest title to the chattel in the person who has possessed it adversely to the rights of the owner for the specified period. The requisite elements are usually similar to those necessary for the obtaining of a title to land by adverse possession, although the period of holding required in the case of chattels is generally less than that required in the case of realty. Title by judgment is that which is acquired by a converter or trespasser against whom the former owner has recovered judgment for the value of the chattel taken. However, in most jurisdictions it is held that such a title does not vest until the judgment is paid. For example, where D wrongfully appropriates a chattel belonging to P, and P, instead of suing to recover the thing itself, elects to bring action for its value and recovers judgment against D, title to the chattel vests in D when the amount of P's judgment is paid to him. Title by bankruptcy is that which vests, by operation of law, in the trustee, and is to what chattels of the bankrupt as are not exempt. Such title vests as of the time of the filing of the petition in bankruptcy.

Same; By Legal Process

Title by legal process may be subdivided into: (1) title by prerogative; (2) title by execution; and, (3) title by judicial decree. The first, title by prerogative, is that form of title to personalty which is acquired and held by the state through the exercise of its sovereign powers. It is the counterpart of title by eminent domain. For example, that title which the government holds in tax proceeds collected for its support is by prerogative. Title

[8] This title is discussed in the next chapter.

[9] This subject is discussed in § 64, supra.

by execution is that title which is acquired and held by one who purchases personalty sold to satisfy the judgment of a court of law. Title by judicial decree, on the other hand, is that which is acquired and held by virtue of a sale ordered by a court in the exercise of equity power. For example, where a chattel is ordered by a court to be sold, in a proceeding brought to foreclose a chattel lien or mortgage, the title the purchaser acquires is title by judicial decree. Interests in chattels may thus be acquired by execution and by judicial decree, as well as interests in realty.

Same; By Act of Persons

Title by act of persons may result in three general ways: (1) by testament; (2) by gift; (3) by sale. Title by testament is that which is acquired and held by a legatee under the will of his deceased testator. Title by gift is that which is acquired and held by a transfer of the property in goods from one called the donor to one called the donee without the payment of any consideration or price being required of the donee. Generally, in order to effect a valid gift, the following three requisites must be satisfied: (a) the donor must intend to transfer his title in the goods to the donee; (b) possession of the chattel which is the subject of the gift must be delivered to the donee; and, (c) the donee must accept the gift. There are two kinds of gifts, but both are governed by this formula. The two kinds are: (1) gifts inter vivos; and, (2) gifts causa mortis. The former, gifts inter vivos, are present, absolute gifts between living persons. Gifts causa mortis, on the other hand, are gifts made by donors in contemplation of death which they believe to be imminent. The principal distinction between the two kinds of gifts is that a gift inter vivos vests an absolute title in the donee which cannot thereafter be revoked by the donor; whereas the donor of a gift causa mortis may revoke the gift at any time before his death, and a gift causa mortis is revoked ipso facto if the donor does not die from the cause he had in mind when the gift was made. In other words, a gift causa mortis does not become absolute until the donor dies from the cause contemplated when the gift was made, and without revoking it. The courts are not agreed as to whether the donor's death is a condition precedent or a condition subsequent as to the donee's title in the case of a gift causa mortis. That is to say, there is some conflict as to whether the donor's death is a condition precedent to the vesting of title in the donee, or whether title vests in the donee when the gift is made, but subject to being defeated if the donor subsequently revokes the gift or does not die from the danger anticipated. However, in most states the rule is that title vests in the donee immediately, subject to defeasance upon revocation or recovery by the donor.

SALES

73. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

This definition is contained in the Uniform Sales Act, a codification of the law governing sales transactions approved by the Commissioners on Uniform State Laws in 1906.[10] Among other definitions of fundamental terms also contained in the Act[11] are the following: (1) "Seller" means a person who sells or agrees to sell goods, or any legal successor in the interest of such person. (2) "Property" means the general property in goods, and not merely a special property. (3) "Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. (4) "Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person. In regard to "price," the Act[12] provides that: "(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties. (2) The price may be made payable in any personal property. (3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply. (4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

Contract to Sell

A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration

10 Section 1(2). The various jurisdictions in which this act has been adopted are listed in the appendix. The common law of sales has also been codified in England by a statute called the Sale of Goods Act, adopted in 1893.

11 Section 76.

12 Section 9.

called the price. "A contract to sell differs from a sale in that the property is not passed by the agreement at the time of the bargain but instead the seller assumes a contractual obligation to make the transfer of the property and the buyer assumes a contractual obligation to accept such transfer at a future time. * * * The one is a present transfer of the property. The other is a contractual undertaking to make and accept such transfer in the future. The difference in legal consequences between sales on the one hand and contracts to sell on the other is tremendous. Thus, if the transaction is a sale, the goods already belong to the buyer, with all the advantages and risks which such ownership involves. If the seller refuses to deliver the goods, the buyer may take them through legal process. [Act, § 66.] If the goods are accidentally destroyed or deteriorated, the loss falls on the buyer as owner. [Act, § 22.] He is liable for the purchase price, if it has not already been paid, irrespective of what happens thereafter to the goods. [Act, § 63.] He is entitled to their increase in value, should that happen, irrespective of whether he has yet paid. If it is a contract to sell, on the other hand, the legal incidents of ownership still fall on the seller. Thus, the accidental loss or deterioration of the goods prevents his performing the contract to sell and precludes his recovering the purchase price. [Act, § 8.] The contract seller as owner of goods can transfer them to another, or keep them for himself, and in ordinary cases the contract buyer's only remedy is an action for damages for breach of contract."[13]

Distinctive and Requisite Elements of Sales

The elements which generally distinguish a sale of chattels or goods from other transactions are: (1) a sale transfers the general property interest in the goods; and, (2) the transfer is for a price paid or promised. If either of these elements is lacking the transaction is not a sale. However, since sales transactions are agreements for a consideration, whether they be present transfers or contracts to transfer in the future, the ordinary rules which govern the formation of contractual relations apply to sales and contracts to sell. Accordingly, in order to have a sales transaction it must appear that there was an offer which was made by one of the parties and which was accepted by the other party. Their minds must have met. They must have agreed.

[13] Vold on Sales, (hereinafter cited "Vold") p. 6.

Capacity of Buyers and Sellers

The Uniform Sales Act[14] provides that the capacity of persons to buy and sell shall be regulated by "the general law concerning capacity to contract, and to transfer and acquire property." But, "where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor." The term "necessaries" is defined to mean, "goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery."

Formalities; Statute of Frauds

In the absence of special statutory requirements no particular form is necessary for a sale or contract to sell, as the Sales Act[15] provides that "subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without sale), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties." However, the provision of the old English Statute of Frauds[16] applicable to sales of chattels has been substantially re-enacted by the Uniform Sales Act.[17] This section reads, "(1) A contract to sell, or a sale of any goods or choses in action of the value of five hundred dollars or upward,[18] shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. (2) The provisions of this section apply to every such contract or sale notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions

[14] Section 2.

[15] Section 3.

[16] 29 Car. II, c. 3, § 17, 1676.

[17] Section 4.

[18] This provision has not been adopted verbatim in all states, however, and the amount fixed in the statutes of the different states varies.

of this section shall not apply. (3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after the delivery of the goods, expresses by word or conduct his assent to becoming the owner of those specific goods." Failure to comply with the provisions of this section, is usually held "not to render the transaction void, but merely to prevent its enforcement by action."[19]

Risk of Loss

Concerning risk of loss the Sales Act[20] provides: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that: (a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery. (b) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such default."

Transfer of Property as Between Seller and Buyer

Under the Sales Act,[21] where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained. Where there is a contract to sell specific or ascertained goods,[22] the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, and the Act provides that "for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."[23] Further, the Act[24] provides that, "unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state,[25] the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed. Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done. Rule 3. (1) When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time. (2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact. Rule 4. (1) Where there is a contract to sell unascertained or future goods[26] by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made. (2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable,

19 Vold, § 22, p. 48.

20 Section 22.

21 Section 17.

22 The term "specific goods," means "goods identified and agreed upon at the time a contract to sell or a sale is made." U.S.A. § 76(1).

23 U.S.A. § 18.

24 Section 19.

25 (Goods are in a "deliverable state" within the meaning of the Sales Act, "when they are in such a state that the buyer would, under the contract, be bound to take delivery of them." U.S.A. § 76(4).)

26 (The term "future goods," means "goods to be manufactured or acquired by the seller after the making of the contract of sale." U.S.A. § 76(1).)

although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents.[26a] Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."[27]

[26a] (Section 20 of the Act reads: "(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer. (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract. (3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, the seller thereby reserves a right to the possession of the goods as against the buyer. (4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.")

[27] In regard to delivery, § 43(1) of the Act provides: "(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery."

Auction sales

In regard to sales by auction the Act[28] provides: "(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale. (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve. (3) A right to bid may be reserved expressly by or on behalf of the seller. (4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer." On the other hand, "agreements among purchasers at auction sales not to bid against each other are fraudulent as regards the seller."[29]

Conditional sales

A conditional sale is defined in the Uniform Conditional Sales Act[30] as: "(1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract."

The Uniform Act[31] provides that a conditional sale contract or copy shall be filed in the office of a designated official of the political unit in which the goods are first kept for use by the buyer after the sale; and that "every provision in a conditional sale re-

[28] Section 21.

[29] Vold, § 69(b), p. 177.

[30] Section 1. The jurisdictions which have adopted this act are listed in the appendix. In other jurisdictions, the theories and laws relating to conditional sales vary.

[31] Section 6.

serving property in the seller shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed."[32]

After the delivery of the goods to the buyer, and prior to any default on his part, the risk of injury and loss rests upon the buyer. However, any increase of the goods is subject to the same conditions as the original goods and consequently an increase will accrue to the buyer upon performance of the conditions by him.

Generally it may be said that under a conditional sales contract the buyer, until his default or performance, is regarded as the owner of the goods for all practical purposes. However, it may also generally be said that both the buyer and seller are regarded as having insurable and transferable interests in the goods until the buyer defaults or performs. Upon performance of the conditions by the buyer, the complete property in the goods vests in him and the interest of the seller is terminated.

Upon default of the buyer, the Uniform Conditional Sales Act allows the seller to retake possession of the goods, but if the seller has not given the buyer at least a twenty-day notice of his intention to retake the buyer is permitted ten days in which he may redeem the goods by payment of the amount due and the expenses of the retaking, unless the goods are of a perishable nature and would be substantially injured or destroyed if kept for ten days.[33] However, in case the buyer has paid at least fifty percent of the price, or if the buyer makes a proper demand in case he has not paid fifty percent of the price, the seller must resell the goods at public auction.[34] The seller may also voluntarily resell the goods for the account of the buyer in cases where a resale is not compulsory.[35] The proceeds of the resale are applied: (1) to the payment of the expenses thereof; (2) to the payment of the expenses of retaking, keeping and storing the goods; and, (3) to the satisfaction of the balance due under the contract.[36] Any sum remaining after the satisfaction of such claims must be paid to the buyer; but, if the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods, and the balance due upon the purchase price, the seller may recover

[32] Section 5.

[33] See U.C.S.A. §§ 16–18.

[34] See U.C.S.A. § 19.

[35] U.C.S.A. § 20.

[36] See U.C.S.A. § 21.

the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer.[37]

If the seller fails to comply with the provisions relating to redemption by the buyer and resales, after he has retaken the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest; [38] but otherwise, if no resale is required or made, the seller may retain the goods as his own property, after a proper retaking, without obligation to account to the buyer, and the buyer is discharged of all obligation.[39]

Concerning the rights of the seller, the Uniform Conditional Sales Act [40] further provides that neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods; but such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer.

Chattel mortgages

Chattel mortgages and conditional sales are, of course, distinct. "In the first place, a chattel mortgage is a conveyance from the mortgagor to the mortgagee of a property interest as security for a debt owing. The conditional sale is not a conveyance from the buyer to the seller at all, but is a conveyance from the seller to the buyer of a limited property interest less than complete unincumbered ownership. In a chattel mortgage the mortgagee's security interest is conveyed to him by the mortgagor; in a conditional sale the conditional seller's security interest is reserved in himself, while he conveys to the buyer the beneficial ownership in the goods. In the second place, the mortgagor is a borrower while the mortgagee is a lender." [41]

As in the case of mortgages of land, there are two theories of chattel mortgages which prevail in the United States. Under the common-law or title theory, a mortgage is regarded as a present transfer of the property in goods from the mortgagor-borrower

[37] U.C.S.A. § 22.

[38] U.C.S.A. § 25.

[39] U.C.S.A. § 23.

[40] Section 24.

[41] Vold, p. 310.

to the mortgagee-lender, subject to defeasance upon the mortgagor's performance of the conditions. Under the equitable or lien theory, a chattel mortgage is regarded as giving the mortgagee a lien on the goods which may ripen into ownership upon default by the mortgagor. Also, as in the case of realty mortgages, the mortgagor of a chattel is generally allowed, by equity or statute, opportunity to redeem the chattel within a certain period after his default, upon payment of the amount due and the mortgagee's expenses. However, the period in which a mortgagor may redeem a chattel is usually much shorter than the period allowed for the redemption of land.

Statutes similar to those applicable to conditional sales, generally require that a chattel mortgage be filed in some public office in order for it to be valid against subsequent purchasers and incumbrancers of the goods, and creditors of the mortgagor who subsequently attach the goods; unless such persons have actual notice of the mortgage, or unless the mortgagee is in possession.

BAILMENTS

74. A bailment is the relation created through the transfer of the possession of goods or chattels, by a person called the bailor to a person called the bailee, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the goods or chattels are to be dealt with according to the instructions of the bailor.[42]

The chief characteristics of a bailment are: (1) the subject-matter must be personalty; (2) there must be a delivery, actual or constructive, of the goods; and, (3) there must be an express or implied acceptance by the bailee of the goods constituting the subject-matter of the bailment. "While in the overwhelming majority of instances the bailment relation is founded on the mutual agreement of both the bailor and bailee, in exceptional cases bailments may exist without such an agreement. One may become a constructive bailee in the absence of any contract between the parties. It is not essential that the bailee should have obtained possession by the consent of the owner, or even with the intention of holding the goods as a bailee. But, in many cases, the law, from considerations of public policy, imposes the liability of a bailee upon one who has, without private agreement,

[42] Dobie on Bailments and Carriers (hereinafter cited "Dobie") § 1, p. 1.

come into possession of the goods of another. Thus, the finder of lost goods, who takes them into his possession, becomes a bailee of the goods. A sheriff, levying on the goods of the debtor and taking possession of them, is also a bailee." [43]

A bailment may be terminated by "1. Act of the parties: (a) By full performance of the bailment purpose or expiration of the time for which the bailment was created. (b) By mutual consent of the parties in all cases, and in some bailments at the option of one of the parties. (c) By the bailee's wrong, at the option of the bailor. 2. By operation of law: (a) By death of bailor or bailee, in some instances. (b) By change of legal status of the parties, in some cases. (c) By destruction of the bailed goods." [44]

A bailment is distinct from a sale in that under a sale ownership or title must be conveyed while possession either may or may not pass, whereas under a bailment ownership must not be conveyed but possession must pass.

As classified in Roman law, bailments were of six kinds: (a) Depositum, a bailment of goods for mere custody, without recompense. (b) Mandatum, a bailment of goods for the purpose of having some more or less active services performed about them by the bailee without recompense. (c) Commodatum, a gratuitous bailment of goods for use by the bailee. (d) Mutuum, a delivery of goods involving not the return of the identical goods bailed, but their replacement by other goods of the same kind.[45] (e) Pignus, pledge, or pawn, a bailment of goods as security for some debt or engagement, accompanied by a power of sale in case of default. (f) A locatio, or hiring, a bailment for reward. And locatios were subdivided as follows: (1) Locatio rei, or the hired use of a thing. (2) Locatio operis, or hired services about a thing. The latter included: (i) Locatio operis faciendi, or hired work and labor about a thing. (ii) Locatio custodiae, or hired custody of a thing. (iii) Locatio operis mercium vehendarum, or hired transportation of a thing.[46]

The rights and liabilities of the parties to a bailment depend primarily upon which party the bailment is intended to benefit, hence the greater the benefit to the bailee, the greater his responsibility and liability. "Bailments may therefore be divided into

[43] Dobie, p. 23.

[44] Dobie, § 20, p. 44.

[45] At common law such a transaction is regarded as a sale or exchange, not a bailment.

[46] See Dobie, § 4, pp. 10, 11.

three classes: (a) Bailments for the bailor's sole benefit, including (1) depositum, and (2) mandatum. (b) Bailments for the bailee's sole benefit, including (1) commodatum. (c) Bailments for the mutual benefit of both bailor and bailee, including (1) pignus, and (2) locatio." [47]

Lien of the Bailee

Generally a bailee who performs services about a chattel has a lien thereon to secure payment of his compensation, but "the bailee's lien for services about chattels is ordinarily a special lien, and not a general one. By a special lien is meant that it secures only the debt created by services about the specific goods upon which the lien is claimed. Such a lien does not cover debts for services on other goods besides those held under the lien." [48] Furthermore, at common law, the lien of a bailee merely entitles him to retain possession of the goods until the bailor performs his part of the agreement. "On default in payment by the bailor, the title to the goods did not vest in the bailee and become absolute at law, as in the case of the mortgage; nor did the bailee have (as has the pledgee) a power of sale as to the goods held under his lien." [49] However, the power of sale could be given by special contract, and the bailee now has a statutory power of sale in practically all of the states.

Locatio operis bailments, or hired services about a thing, are sometimes classified as: (1) ordinary bailments; or, (2) extraordinary or exceptional bailments, the latter being those which involve (a) innkeepers; (b) common carriers; and, (c) the post office department.

Innkeepers

An innkeeper is one who "holds himself out to the public to furnish either lodging alone, or lodging and some other form of entertainment, to transients for hire. This definition excludes: (a) Persons furnishing only occasional entertainment. (b) Keepers of mere restaurants and eating houses. (c) Keepers of boarding houses or lodging houses. (d) Sleeping car companies and steamship companies." [50] A guest, on the other hand, is a transient who patronizes an inn with the consent of the innkeeper. The relation of innkeeper and guest begins when the guest is accepted as such, and may be terminated: (a) by the innkeeper for the guest's misconduct or default in payment of reasonable charges for his entertainment; and, (b) by the guest at any time, by signifying an intention to do so.

[47] Dobie, § 5, p. 12.

[48] Dobie, p. 149.

[49] Dobie, p. 153.

[50] Dobie, § 90, p. 241.

The duties of an innkeeper primarily consist of: (1) the duty to receive guests; (2) the duty to care for the safety and comfort of his guests; (3) the duty to care for the goods of his guests. And, at common law, by the weight of authority, an innkeeper is liable as an insurer of the guest's goods brought within the inn, unless the loss or damage is caused by an act of God, the public enemy, or a fault of the guest. This liability extends to all the goods of the guest brought within the inn except (a) goods for show or for sale; and, (b) goods retained in the exclusive custody of the guest. However, "the liability of the innkeeper as to the goods of the guest may be limited: (a) By contract. (b) By statutes, which usually limit his liability: (1) In some states, for losses above a certain amount. (2) In a great many states, on his giving notice, for goods not delivered to the innkeeper to be put in his safe." [51]

To secure his proper compensation the innkeeper has a lien on all the property within the inn belonging to the guest. And, "since the innkeeper is compelled to receive even persons incompetent to contract, such as married women and infants, his lien is valid in such cases. The lien is similar in its various legal incidents to other common-law liens; but the lien arises on goods brought to the inn by the guest, even though they are never actually delivered to the innkeeper, but are retained by the guest in his own possession. Even property which is exempt from execution and attachment, if brought to the inn, is subject to the innkeeper's lien. As a general rule, then, if the goods are brought to the inn and are owned by the guest, the innkeeper can detain them as security for his unpaid charges. In most of the states, provision is made by statute for the lien of the innkeeper." [52] The innkeeper may waive his lien by voluntarily parting with the possession of the goods, or by any other conduct inconsistent with the continuance of the lien; and modern statutes generally permit the innkeeper to sell goods subject to his lien in satisfaction of his claim against the guest although at common law the innkeeper had no right to sell goods by virtue of his lien.

Carriers

A carrier is one who undertakes to transport goods or persons from one place to another. Carriers are either private or public.

[51] Dobie, § 98, p. 279.

[52] Dobie, pp. 285, 286.

A private carrier is one who, without engaging in such business as a public employment, "undertakes by special contract to transport goods in particular instances from one place to another. * * * The private carrier of goods, making no public profession, is an ordinary bailee, and subject to the same rules governing other ordinary bailees. He is vested with no exceptional rights and incurs no extraordinary responsibilities." [53] A common carrier of goods, on the other hand, "is one who holds himself out, in the exercise of a public calling, to carry goods for hire, for whomsoever may employ him." [54] The most important liabilities imposed by law upon the common carrier of goods are: "(a) His duty to carry for all. (b) His duty to furnish equal facilities to all. (c) His liability for loss of, or damage to, the goods. (d) His liability for deviation and delay." [55] Thus, the common carrier is an insurer of goods carried in that capacity against all loss or damage except that caused by: "(1) The act of God. (2) The public enemy. (3) The act of the shipper. (4) Public authority. (5) The inherent nature of the goods. Even when the loss is caused by one of the excepted perils against which the common carrier is not an insurer, he is nevertheless liable if he fails to use reasonable care either to avoid such peril or to minimize the loss after the goods are actually exposed to the peril." [56] This extraordinary liability of the common carrier attaches when the goods are delivered to and accepted by the carrier, and terminates, generally, when the transportation is completed and the goods are delivered to either the consignee or a connecting carrier in accordance with the terms of the contract.

As for his rights, the common carrier of goods is entitled to a reasonable compensation for his services which he may demand in advance, and he has a lien for his proper charges on goods received from one who had authority to deliver them for transportation. At common law, a common carrier has no right to sell goods of shippers for the payment of his charges and to satisfy his lien but such a right is now conferred by statute in practically all of the states.

Post Office Department

The post office department "is a carrier of the mail, but, being a branch of the government, is not liable for loss of, or injury to,

53 Dobie, pp. 297, 298.

54 Dobie, § 107, p. 300.

55 Dobie, § 108, p. 312.

56 Dobie, § 116, p. 324.

the mail, occurring in its transmission." [57] However, "to senders of mail, postmasters and other officials of the post office department are individually liable for losses sustained * * * when such losses are due to: (1) Their own immediate negligence or misconduct. (2) Their negligence in either selecting subordinates or supervising their conduct. (3) The acts of their private servants, who are not agents of the government." [58]

PLEDGES

75. A pledge or pawn is a bailment to secure the payment of a debt or the performance of an engagement, accompanied by a power of sale in case of default.[59]

A pledge is a special form of bailment, but in addition to those circumstances that are essential to any bailment, for the establishment of a pledge there must be: (1) Mutual assent of the parties, as a pledge cannot be created by operation of law. (2) A debt or engagement secured. The pledgor need not be the absolute owner of the goods, and ordinarily a person can pledge, just as he can sell, any assignable interest that he has in goods. Hence, "unless public policy or some statute forbids, any assignable interest in personal property, corporeal or incorporeal, may be pledged." [60]

The principal rights and duties of a pledgor, unless varied by special contract, are as follows: "(a) He impliedly warrants his title or interest. (b) His interest is assignable. (c) At common law, the pledgor's interest seems not to have been subject to judicial sale, but this is now changed in most states by statute. (d) He can sue third persons for injuries to the pledged goods. (e) He has a right to redeem the pledged goods, which continues until it is lost: (1) By a valid sale of the goods by the pledgee after the default of the pledgor. (2) By a subsequent release by the pledgor of his right of redemption. (3) By the running of the statute of limitations." [61]

The rights and duties of the pledgee depend largely upon whether or not there has been a default by the pledgor; but, generally, his interest is assignable and he is deemed to have a special property in the goods which entitles him to the possession

57 Dobie, § 150, p. 484.

58 Dobie, § 151, p. 485.

59 Dobie, § 70, p. 173.

60 Dobie, § 73, p. 185.

61 Dobie, § 75, p. 197.

of them and which he can protect by appropriate action, although ordinarily he has no right to use the pledged goods. However, the pledgee can hold the profits and increase of the goods pledged, but he must account for these to the pledgor; and the pledgee can charge the pledgor with expenses necessarily incurred as to the pledged goods.

The pledgee must exercise ordinary care or diligence in caring for the goods pledged, and he must, on redemption by the pledgor, "redeliver the identical things pledged, except in cases of certificates of corporate stock." [62]

Default of the pledgor in the debt or engagement secured "confers unique rights on the pledgee, who then becomes more than a mere bailee. The pledgee's chief concern then becomes the realization of such debt or the performance of such engagement, and the methods of dealing with the pledged goods to encompass this end." [63] Upon the pledgor's default, the pledgee may: (a) Continue to hold the pledged goods as security, without taking any other action. (b) Bring suit against the pledgor on the debt or undertaking secured, without in any way impairing his rights in the pledged goods. (c) The pledgee may sell the pledged goods: "(1) At common law, upon notice to the pledgor. (2) By a proceeding in equity, when his common-law right of sale is not clear, or is disputed, or when an accounting is necessary. (3) Under a power of sale given by the pledge contract. (4) Under a power of sale given by statute, which either may or may not take away the right to sell at common law or under the pledge contract, according to the language of the particular statute." [64]

A pledge may be terminated by "1. Act of parties: (a) By performance of the obligation secured, or tender thereof, by the pledgor. (b) By valid sale of the pledged chattel by pledgee on pledgor's default. (c) By consent of the pledgee. (d) By redelivery of the pledged article to the pledgor. (e) By conversion or like wrong of the pledgee, at the pledgor's option. 2. Operation of law: (a) Destruction of the pledged chattel." [65]

[62] Dobie, § 84, p. 222.

[63] Dobie, § 85, p. 225.

[64] Dobie, § 88, p. 229.

[65] Dobie, § 89, p. 236.

CHAPTER 16

SUCCESSION

IN GENERAL

76. The law of succession is the law which regulates the disposition of property after the death of the owner.

This division of the law is divided into: (a) the law of testate succession; and, (b) the law of intestate succession. The former, testate succession, is that form of succession which is governed by the last will of the deceased property owner. Intestate succession, on the other hand, is that form of succession which, by reason of the absence of a last will of the deceased property owner, is governed by the legal rules of descent and distribution.

Terminology

The Anglo-American law of succession is burdened with a complicated terminology which has resulted because of the peculiarities of its historical growth, and particularly because of the distinction drawn between realty and personalty. Thus, the word "will" was formerly used in England only in connection with real property. If the disposition was of personal property, or if an executor only were appointed, the term "testament" was applied to the instrument or oral disposition. Often the same instrument would dispose of both real and personal property, and thus the term "last will and testament" came into common use. However, the distinction between the two has disappeared and "will" is the expression used at the present time to describe dispositions of both sorts of property.

When a person leaves a will he is said to have died "testate," and the person leaving a will is referred to as the "testator," although in the case of females the expression "testatrix" is often employed. Formerly, the expression "devisor" was used to denote persons making wills of real property, and is still so used at times, but the term "testator" is commonly used to designate the maker of a will regardless of the nature of the property it dis-

poses of. The person to whom realty is given by a will is commonly called a "devisee" and the disposition itself is denominated a "devise." Money passing under a will is properly called a "legacy," and the person to whom it is given is designated a "legatee." The term "bequest," however, includes any form of personalty passing under a will, and hence is technically broader than "legacy." Strictly speaking, "to devise" means to pass realty by testamentary act, whereas only personalty is "bequeathed." However, the terms devise and bequest are used interchangeably without difference in legal effect.

When a person, whether male or female, dies without leaving a will, he is called an "intestate," and in such a case the law determines the manner in which his property is divided. The persons entitled to an intestate's realty are called his "heirs," whereas those succeeding to his personalty are referred to as "distributees," or as "next of kin." To a considerable extent, however, the term "heir" is now used to describe the successors of either the real and personal property of an intestate. Indeed, the word "heir," in popular language, is used to describe any successor to the property of a decedent, whether the property passed under intestate laws or by virtue of a will.

The intestate laws of a state are frequently called "statutes of descent and distribution," the term "descent" being applied only to realty, which passes at once from the intestate to the heir upon the former's death; whereas personalty is said to be "distributed" to the next of kin because title to it vests in the personal representative of the deceased, who allots the property among the persons entitled to it. In case of intestacy the personal representative is appointed by the court and is called the "administrator," and if an administrator commences to act and later dies or is removed his successor is called an "administrator de bonis non," (of the goods not administered) commonly abbreviated "d. b.n."

"Executor" and "Administrator"

A person who is named by a testator as the one to have charge of the matter of the distribution of his personalty is called the "executor." He may have certain powers with reference to the realty also, either by virtue of the terms of the will or some statutory provision. In case the testator nominates no executor, or if for any reason the person nominated does not act, the court will name some one to perform the same functions. Such a person is called an "administrator cum testamento annexo," (with the will annexed), commonly abbreviated "c.t.a." If an executor dies or is otherwise removed after partially completing the matters of administration a successor must be appointed to complete the matter of administration and he is called an "administrator c.t.a., d.b.n." The same cumbersome title would apply to one who succeeded to the duties of an administrator c.t.a. In case a personal representative is a female, the terms "executrix" and "administratrix" are often applied.

"Probate" and "Administration"

The word "probate" is used to denote the act of proving a will before a suitable court, together with the approbation thereof by that tribunal. In popular language "probate" sometimes indicates the whole process of "administration" which properly signifies the personal representative's collection of the assets, payment of the debts, and distribution of the proceeds of a decedent's estate under supervision of the appropriate court. Technically, probate refers only to the judicial act of approving the will after due proof thereof, whereas administration refers equally to the subsequent proceedings in testate estates and to the entire series of acts in case of intestacy. In general, administration applies only to the personal property as land ordinarily passes directly to the heir without intervention of the personal representative.[1]

INTESTACY

77. The laws of intestacy are those which govern the succession of the property of a person who dies without leaving a valid will.

English History; Realty

The history of the development of the law of intestacy in England is essential to an understanding of such law in the United States. "From Tacitus we learn that the Germans on the continent had developed a plan of succession based on kinship in which males were preferred to females. [Germania, c. 20; Lex Salica, 59.] This scheme, perhaps modified to some extent, was in vogue in the England of the Saxons. After the conquest the law of descent of land was influenced by feudalism. In harmony with that institution, primogeniture, or the right of the eldest son to inherit to the exclusion of the younger brothers became

[1] See Atkinson on Wills, (hereinafter cited "Atkinson"), pp. 1–5.

established. The social, economic and political philosophy of the times led to other developments in the law of inheritance. The main principles of this branch of the common law had become established by the end of the reign of Henry III (1216–1272). * * * In 1713 Sir Matthew Hale described the course of descent by enunciating seven principal precepts with illustrations and subsidiary rules under each. [History of the Common Law, c. 11.] About half a century later, Blackstone in his famous Commentaries [Bk. 2, c. 14] announced his Canons of Descent, also seven in number. These were different in form, in order, and to some extent in substance from Hale's. The canons of Blackstone are doubtless the better known of the two. Minus the illustrations and explanatory clauses they read as follows: I. Inheritance shall lineally descend to the issue of the person who last died actually seised in infinitum. II. The male issue shall be admitted before the female. III. Where there are two or more males in equal degree, the eldest only shall inherit; but the females all together. IV. The lineal descendants in infinitum of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living. V. On failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations being of the blood of the first purchaser; subject to the three preceding rules. VI. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood. VII. In collateral inheritance the male stock shall be preferred to the female, unless where the lands have in fact descended from a female. Thus all of intestate's realty descended to his eldest son. If the eldest son predeceased the intestate, leaving no issue, the second son took and so on. In case deceased left daughters and no sons or issue of sons, the daughters took the land together as coparceners in preference to intestate's brothers, uncles, nephews or other collateral kindred. If the eldest son predeceased the intestate leaving issue, this issue male or female according to the above rules would inherit to the exclusion of younger sons of the intestate. If deceased left no descendants, his father could not inherit from him, but the land went to the deceased's oldest brother or his issue. If deceased left no brothers, his sisters took as coparceners as in the case of daughters. If there were no brothers or sisters or their issue the land went to the deceased's oldest paternal uncle or his issue and so on. Assuming that the deceased obtained the land by purchase, even the closest collateral on the mother's side would be postponed

to the entire paternal line including females." [2] Land which was obtained by descent from the mother who in turn had inherited it from her father, the first purchaser, would go to collaterals on the mother's side. Uncles and cousins on the father's side could never inherit this land. It would escheat to the King upon total failure of the mother's line.

The common-law system remained intact in England until the Inheritance Act of 1833.[3] "This statute abolished the principle of non-inheritance by parents and other lineal ancestors and thereafter the following order of preference prevailed: (1) Descendants; (2) parents; (3) brothers and sisters and their issue; (4) grandparents; (5) uncles and aunts, etc. Preference for the father, his ancestors and their descendants continued to be given over the line of the mother. The rule announced in Canon I requiring seisin was abolished, as was the rule excluding the half-blood.[4] The latter were entitled to take next after relatives of the whole blood of the same degree when the common ancestor was a male and next after the common ancestor when the latter was a female." [5] Various changes were also made in the law of inheritance by collaterals, and later legislation made further modifications of the common-law rules. Finally, the whole matter of descent was altered by the Administration of Estates Act of 1925,[6] and the persons who succeed to the realty of an intestate are the same under this act as those who succeed to the personalty, as this act makes a single provision for both species of property.

Same; Personalty

After a period of uncertainty as to who was entitled to the personal property of an intestate, Parliament passed the Statute of Distribution in 1670.[7] This statute commanded the administra-

[2] Atkinson, pp. 21–23.

[3] 3 & 4 Wm. IV, c. 106.

[4] As used in the law of succession, the term "half-blood" denotes the degree of relationship between two individuals who have the same mother or the same father but not both parents in common.

[5] Atkinson, pp. 23, 24.

[6] 15. Geo. V, c. 23.

[7] 22, 23 Car. II, c. 10. In the case of personal property, next of kin were determined by the method of the civil law, which was to ascertain the closest common ancestor of the intestate and the claimant and then to count the steps from the intestate to the common ancestor and also the steps from the common ancestor to the claimant. The sum of the two figures represented the degree of relationship between the claimant and the intestate, and, as so computed,

tor to distribute the property after payment of debts: "(a) One-third to the widow and two-thirds to the children or their issue if both widow and children or issue survived; (b) All to the children or their issue if the widow did not survive; (c) Half to the widow and half to the next of kin if there were no issue; (d) All to the next of kin if neither widow nor issue survived. In case of collateral relatives and lineal ancestors, next of kin were computed by counting the number of steps from the claimant to the common ancestor of intestate and the claimant and adding the number of steps from the common ancestor to intestate. Claimants who were by this calculation closest related to the intestate were entitled to the personalty. Representation, or the right to stand in the place of one's predeceased parent, was permitted in case of nieces and nephews." [8]

Same; The Administration of Estates Act of 1925.

Under the Administration of Estates Act of 1925, there is no distinction in succession based on the nature of the property, nor on the age or sex of the surviving relatives. The table of inheritance favors first the surviving spouse and descendants, and in the absence of these the property passes to designated ancestors and collateral relatives. Greatgrandparents or their descendants may not take the property of an intestate and in the absence of closer kin the property passes to the crown. The half-blood takes only in the absence of whole blood of equal degree. "This act provides that both real and personal property should pass to the administrator, upon trust to sell and to pay the debts and expenses and distribute the residue. There is no difference between realty and personalty as to the persons entitled to succeed thereto. The rules of descent and the rights of dower, curtesy, and escheat to the mesne lord are abolished. No distinction is made between the estates of males and females, and no preference is

the claimant who stood in the smallest numerical degree of relationship to the intestate took his personalty; but if the claimants were in equal degrees of relationship to the intestate they shared the chattels equally.

Another method of ascertaining kinship was that of the canon law, used by the church to determine what marriages between relatives were forbidden. According to this method, the steps from the common ancestor to each of the persons involved were counted, as in the civil method, but instead of taking the sum of these two figures, only the larger was used, and this represented the degree of relationship under the canon law. The canon method of determining kinship was never used in England under the Statute of Distribution. See Atkinson, pp. 30, 31.

8 Atkinson, §§ 7, 8, p. 24.

given to male over female relatives. The surviving spouse, whether male or female, is entitled to the 'personal' chattels [9] absolutely and to the first thousand pounds of the residue. The balance of the residue also goes to the surviving spouse for life if there is no issue. If there be a surviving spouse and also issue, the former is entitled to one-half of the balance for life and the issue to the remaining half upon statutory trusts. If there be issue but no surviving spouse, the issue takes the whole upon statutory trusts. * * * In the absence of issue then subject to the above-mentioned share of the surviving spouse, the following take in the order named in the absence of persons in the preceding classes: (1) Parents equally or the whole to the surviving parent; (2) brothers and sisters of the whole blood; (3) brothers and sisters of the half-blood; (4) surviving grandparents equally; (5) uncles and aunts of the whole blood; (6) uncles and aunts of the half-blood; (7) the surviving spouse absolutely; (8) the crown." [10]

Descent and Distribution in the United States

Statutes in many of the states now provide that the same relatives shall succeed to both the realty and personalty of an intestate, most of the principles peculiar to the English Canons of Descent having disappeared from the law in the United States before 1800. However, the inheritance tables of the several states differ from each other in many respects although they follow, in a general way, the scheme of the English Statute of Distribution.

Spouses

The statutes of the various states which make provision for the surviving spouse vary greatly, but generally the husband or the wife may inherit lands as well as chattels from the deceased spouse although a larger share of the personalty frequently passes to the former under intestate laws.[11] "The widow, and often the widower, obtains a forced share of the spouse's property under the intestate laws, or through dower, curtesy, or their statutory substitutes, or the institution of community property." [12]

9 (These are defined by § 55x of the act to include furniture, household effects and vehicles; but not chattels used in business, nor money or securities.)

10 Atkinson, pp. 43, 44.

11 Except for the surviving spouse, relatives by marriage have no place in the scheme of succession except in a few jurisdictions where they may take in the absence of blood relatives.

12 Atkinson, § 20, p. 47.

Children

Children or issue of an intestate inherit the latter's property subject to the interests of the surviving spouse, taking equally regardless of sex or age, and the issue of predeceased children generally take their parent's share. That is, in such a case, the division is per stirpes, according to the number of decedent's children, rather than per capita, according to the number of grandchildren. Descendants, however remote, take in preference to all other blood relatives.

Parents

In most states the parents inherit equally, in the absence of a spouse and descendants, although there are some deviations from this plan; and brothers and sisters generally take next after parents. However, in a few jurisdictions, brothers and sisters are preferred to the parents, and in others they share equally with the parents, particularly if only one parent survives.

Next of Kin

When none of the relatives enumerated in the statute survives the intestate, his property goes to his next of kin;[13] and in determining who are next of kin some states apply the principle of representation. That is, the right of one to stand in the place of his predeceased ancestor. However, this principle is usually confined to the children of brothers and sisters.

Half-blood; Posthumous Heirs

In most jurisdictions the half-blood shares equally with relatives of whole blood of the same degree, although in some states the half-blood takes a smaller share; and posthumous descendants of the intestate succeed to his property just as if they were born in his lifetime, and the same is generally true of posthumous collateral relatives if they are in embryo at the time of intestate's death, but no other posthumous relatives may take.

Ancestral Property

The doctrine of ancestral property, that is preference of the branch of the intestate's family from whom realty was inherited, has been abolished in most states although it still prevails in some, particularly so as to exclude the half-blood; but it is seldom applicable to personal property.

13 "Next of kin," in the various states, are "usually computed by the method of the civil law." Atkinson, § 24, p. 52.

Illegitimates

Statutes in almost all of the states permit an illegitimate child to inherit from his mother, and quite generally the process of legitimation is recognized whereby such a child may inherit from his father, and often from other relatives. An illegitimate may also inherit from his spouse and descendants and they from him; and if an illegitimate would be permitted to inherit from certain relatives, they may inherit from him if they happen to survive.

Adopted Children

In almost every state an adopted child inherits from his adoptive parents, although not generally from the latter's other relatives. However, upon the adoptive child's death without spouse or issue his property goes to his natural parents in most jurisdictions, rather than to his adoptive parents.

Escheat

It is generally provided by constitutional or statutory enactment "that in absence of heirs capable of taking, intestate property goes to the state or subdivision thereof by escheat. Usually it is specified that the property goes to the school fund either of the state or of the district in which the deceased was domiciled. Probably escheat to the state would be recognized upon common law principles even if there was no pertinent legislation."[14] But it is only in the absence of all blood relatives that the property of an intestate will escheat to the state and most jurisdictions provide a long period during which heirs may claim the property before an escheat becomes final.[15]

TESTACY

78. A will is the legally enforceable declaration of a person's intention of what he desires to be done after his death, which declaration is revocable during his lifetime, and is operative for no purpose until death, and is applicable to the situation which exists at the maker's decease.[16]

14 Atkinson, p. 74.

15 "Conviction of crime does not cause an escheat of the felon's property to the state. In the case of life convicts, some jurisdictions provide that the property shall pass to the convict's heirs at law or the beneficiary under his existing will." Atkinson, § 33, p. 73.

16 Atkinson, § 1, p. 1.

Testamentary Capacity

Generally, in order for a person to be qualified to make a valid will, he must be of sound mind and of proper age. At the present time, a married woman has practically the same capacity to make a will as a man or a single woman although this was not the rule at common law. And a convict may make a valid will, except in certain jurisdictions where statutes direct that his property be distributed according to intestate laws or his former will. Aliens have always had the power of disposing of personalty by will, and a common-law disability to devise realty has been very largely removed by state statutes or federal treaties.

To have the mental capacity necessary to make a valid will one must be of sound mind, but he need not possess superior or even average mentality. "One is of sound mind for testamentary purposes only when he can understand and carry in his mind in a general way: (1) The nature and extent of his property. (2) The persons who are the natural objects of his bounty, and (3) The disposition which he is making of his property. He must also be capable of: (4) Appreciating these elements in relation to each other, and (5) Forming an orderly desire as to the disposition of his property. In general, mental incapacity may exist because of (a) deficiency or (b) distortion or derangement of mind. One may be mentally deficient because he lacks one or more of the first four of the above requirements, while derangement will be due to the absence of the fifth."[17] The rule is that a testator must be mentally competent at the time of the execution of the will.

As for the age requirement, "the early English rule was that males of fourteen and females of twelve could make a testament of personalty while wills of land were not good unless the testator was twenty-one. In absence of statutory provision these figures are followed in this country but legislation governing this matter exists in almost every jurisdiction."[18]

Formalities

The formalities required for the execution of a valid will vary in detail in the different states, but it may be said that generally an ordinary will must be written, signed by the testator, and witnessed. However, in some states, holographic wills, or those written and signed entirely in the testator's hand, are valid without formal attestation; and in most states, subject to express restrictions, nuncupative or oral wills of all or a certain amount of the testator's personalty are recognized by statute. However, under the Statute of Frauds,[19] realty cannot pass by nuncupative will and the same is true under most of the statutes of the states. But oral wills of soldiers in actual service and of sailors at sea were excepted from the operation of the Statute of Frauds, and in most jurisdictions verbal wills of such persons are valid although various restrictions applicable to nuncupative wills of others are not observed.

[17] Atkinson, § 77, p. 186.

[18] Atkinson, § 76, p. 183.

Revocation

"Revocation" is the termination of the potential capacity of a will to operate at the testator's death, either by the latter's act or by operation of law, and a will can be revoked at the pleasure of the testator even if he has contracted not to revoke, but in the latter case appropriate remedy may be had against the estate upon a contractual basis. "The methods by which a revocation may be effected are: (a) Physical acts done to the will, as prescribed by statute. (b) A subsequent writing, in the form fixed by statute, either expressly or impliedly revoking the will. (c) Certain well-defined changes in the circumstances and conditions of the testator from which a revocation will be implied in law."[20]

Probate

Probate is the judicial establishment of an instrument as the will of a competent testator, executed in the manner required by statute, and may be effectuated only in the tribunals to which this jurisdiction is given by law and which are usually called "probate courts." The primary place of probate is in the state and county in which testator was domiciled at the time of his death, but afterward the will may be admitted to probate in other states where the deceased left property. The domiciliary probate is conclusive everywhere in regard to personalty but not with regard to lands in other jurisdictions.

In most jurisdictions there is no time limit within which a will may be probated, but statutes sometimes protect persons who make purchases from heirs in good faith, and some states prohibit probate after a designated number of years and the effect of provisions of the latter sort is to allow the property to pass under the intestate laws if the limitation period has expired.

[19] 29 Car. II, c. 3.

[20] Atkinson, § 153, p. 367.

The effect of probate is to preclude collateral attack of a will on the ground of forgery, improper execution, lack of testamentary capacity, or revocation. But, when a will has been discovered after probate of a prior will or adjudication of intestacy it may be probated and carried out. However, parties who relied upon the earlier decree will be protected. In the absence of statutory limitation "a will lost, or mutilated without intent thereby to revoke, may be admitted to probate upon satisfactory proof of its contents and due execution."[21]

Rules of Construction

The most important rules of construction applied to wills are: "(a) A will is generally presumed to speak as of the time of the testator's death. (b) Each part of the will and its codicils is construed in connection with the other parts, and effect is given to all if possible. (c) The general intention controls the specific intention. (d) As between two irreconcilable parts, the latter prevails. (e) Nontechnical words are understood in their ordinary sense if there is nothing to indicate a contrary intent. (f) Technical words are understood in their legal meaning unless the circumstances indicate a different usage. (g) To effectuate a manifest intent, a will may be read as if words were rejected, supplied, changed or transposed. (h) The just and reasonable construction will be adopted when two meanings are equally permissible from the language used. (i) Where there is room for construction, that meaning will be adopted which favors those who would inherit under the intestate laws. (j) There is a presumption against intestacy, total or partial. (k) As between two possible constructions, that which discloses a legal purpose will be preferred to one which is invalid. (*l*) If the language of the will gives rise to a necessary implication that a gift was intended, such intention will be effectuated, though no gift is bestowed in express terms."[22]

PROPERTY PASSING BY SUCCESSION

79. Generally, the property of a person, whether legal or equitable, may pass to the beneficiaries named in his will, or to the persons designated by the intestate laws if there is no valid testamentary disposition, but such property is subject to the claims of the creditors of a decedent.

[21] Atkinson, § 186, p. 452.

[22] Atkinson, § 266, p. 759.

Exceptions

This general rule, however, is subject to certain exceptions and restrictions. Thus, at common law, future interests in realty could pass only by will, not by descent. But by the prevailing modern view such interests may pass by descent. And in regard to joint estates, the surviving joint tenant takes by the terms of the grant, not by succession from the deceased tenant. The same is also true of a remainderman after the termination of an ordinary life estate; but an estate for the life of another ("to A, for the life of B") passes to the personal representative of the life tenant (A) upon his death before the death of the other (B). Further, where estates tail exist, the heirs of the body take by grant and not by descent.

Dower and curtesy

At common law a widow was entitled to a life interest in one-third of the land which her husband owned during coverture, and as she took this interest under the law, the husband's will could not deprive her of it. However, she took no forced share in the personalty of her husband but most jurisdictions now provide that regardless of the husband's will his widow takes a certain fractional share of his lands and chattels upon his death. Common-law dower was not subject to the husband's ordinary debts and the same is true of statutory dower in some jurisdictions; but the modern tendency is to free only the homestead and the widow's allowances from the claims of the husband's creditors.

In some jurisdictions the widow may take her forced share in addition to interests left her by the husband's will unless a contrary intention appears therein; but in other jurisdictions she must elect which she will take, unless the will shows an intention that she is entitled to both. When a widow does elect against her husband's will the result is not total intestacy but only such diminution of the shares of the legatees and devisees as is necessary to provide her statutory share; and the interest which she renounces under the will is applied among the disappointed legatees and devisees so as to permit as equitable a distribution as is possible under the circumstances.

At common law in case of birth of issue to the marriage, the surviving husband obtained an estate by the curtesy which entitled him to a life interest in all the wife's realty but this right is now greatly modified by statute. The modern tendency of legislatures is to treat both husband and wife equally as to their respective forced shares, election, and the like.

Protection of Children

In practically all of the states a parent has the power to disinherit his children by willing his property to other persons, but the rigor of this rule is abated to some extent by certain practical considerations and legal doctrines. Thus, "(1) Juries may tend to set aside wills disinheriting children for that reason rather than the ostensible grounds employed as basis of the contest. (2) Failure to mention a child may be an indication of lack of mental capacity of the testator. (3) Statutes in many states declare that children born at the time of making a will and not mentioned or provided for therein may take their intestate shares. (4) In some jurisdictions, a will is revoked by the subsequent birth of a child and in almost all others the afterborn child may take his intestate share against the parent's will. (5) A child may not be disinherited simply by declaring that he shall receive nothing; the property must be devised or bequeathed to others in order to make the disherison effective. (6) A decree requiring a father to support his minor child will be enforced against the father's estate; though the general obligation to support probably cannot be asserted as a claim upon the deceased parent's property."[23]

Homesteads; Family Allowances

Most of the states have statutes which provide that the homestead, and often specified chattels, pass to the family of a deceased "head of a family," and in addition the family is often given an allowance of money from the estate for support during the period of administration. Such provisions generally are not subject to being defeated by will, nor by the non-lien creditors of the decedent.

Charitable and Religious Devises and Bequests

In some states statutes forbid or limit charitable and religious devises and bequests. "These stipulations take the form of: (1) Absolute prohibitions of certain types of testamentary provisions, (2) Stipulations that such testamentary gifts are invalid unless the will is executed a specified time before testator's death, (3) Limitations of the proportion of the entire estate which may be devoted to these purposes. Frequently a state has provisos of both the second and third type. Generally these limitations have no effect unless the testator is survived by specified classes of close relatives, who alone may object to the failure of compliance with the statute."[24]

[23] Atkinson, § 47, p. 91.

[24] Atkinson, §§ 49, 50, p. 106.

Effect of Misconduct

In the absence of statute there is no limitation upon testamentary gifts to a person's mistress or illegitimate children. And, in general, misconduct of an heir toward the decedent does not prevent the heir from taking under the will of the decedent or the intestate laws. Further, "mere adultery or abandonment, without divorce, does not prevent the guilty spouse from inheriting from the one who has been wronged, though it would seem that abandonment should work a loss of homestead and family allowances. By an ancient English Statute [Westminster II, 13 Edw. I, c. 34, 1285] a wife eloping in adultery from her husband was barred of her dower. This principle is sometimes applied to dower and its statutory substitutes and legislation often extends it to bar general rights of inheritance from the deceased spouse. Where the guilty spouse has, in addition, contracted a bigamous marriage some courts have denied him the right to inherit from the other spouse upon the basis of estoppel."[25]

As to the effect of homicide, "in the absence of statute, most courts have held that a person wrongfully killing another may take the latter's property if otherwise entitled thereto by will or under the intestate laws. A minority of jurisdictions have held that the murderer is barred from inheriting from his victim. Decisions permitting the inheritance generally have resulted in legislation designed to alter the rule in such cases. These statutes have been construed narrowly so as to prohibit the inheritance only in the situations clearly covered by the statute."[26]

[25] Atkinson, § 53, p. 111.

[26] Atkinson, § 54, p. 111.

CHAPTER 17

CONTRACTS

IN GENERAL

80. A contract, in its broadest sense, is an agreement whereby one or more of the parties acquire a right, in rem or in personam, in relation to some person, thing, act, or forbearance.[1]

Definitions; "Executed" and "Executory"

In its inception, a contract may be: (a) executory, that is, an obligation assumed by one or both parties to do or to forbear from doing some act, the rights thus acquired being rights in personam; or, (b) it may be executed, everything having been done at the time of the agreement, and no obligation being assumed. Executory contracts, when fully performed, are also said to be "executed." However, "a contract in its narrower, and more proper, sense is an executory contract. It is the result of the concurrence of agreement and obligation, and may be defined as an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."[2]

Same; "Agreement" and "Obligation"

An "agreement," in the sense in which the term is used in the law of contracts, means "the expression by two or more persons, either by words or by conduct, of a common intention. In legal contemplation, at least, there must be a meeting of two minds in one and the same intention."[3] An "obligation," in the sense in which the term is used in the law of contracts, "is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group."[4] Hence, an agreement which results in a contract is an agreement which directly contemplates an obligation; and a contractual obligation is that form of obligation which springs directly from an agreement.

[1] Clark on Contracts, 4th Ed., (hereinafter cited "Clark"), § 1, p. 1.

[2] Clark, § 2, p. 2.

[3] Clark, § 3, p. 3.

[4] Clark, § 4, p. 6.

Same; "Void," "Voidable," and "Unenforceable" Agreements

Void, voidable, and unenforceable agreements are distinguished and defined as follows: "A void agreement is one that is entirely destitute of legal effect. A voidable contract is one that is capable of being affirmed or rejected at the option of one of the parties, but which is binding on the other. An unenforceable contract is one that is valid, but incapable of being sued upon or proved by one or both of the parties."[5]

Same; "Unilateral" and "Bilateral" Contracts

A unilateral contract is one in which a promise is given by one party in exchange for actual performance by the other party; for example, an offer of a reward. In such a case the promisee is not bound to perform the requested act or forbearance but if he does perform the contract comes into existence and the promisor is bound. A bilateral contract, on the other hand, is one in which mutual promises are given in exchange for each other.[6]

Essentials and Characteristics of Contracts

To establish a contractual relation there must be an agreement which results in an obligation, and the agreement must be enforceable at law. Therefore: "(a) There must be a distinct communication by the parties to one another of their intention, or an offer and acceptance. (b) The agreement must possess the marks which the law requires in order that it may affect the legal relations of the parties, and be an act in the law. Therefore—(1) It must be in the form required by law. (2) There must be a consideration, when required by law. (c) The parties must be capable in law of making a valid contract. (d) The consent expressed in offer and acceptance must be genuine. (e) The objects which the contract purposes to effect must be legal."[7]

Same; Offer and Acceptance; "Implied" Contracts

To create a contract the expression of common intention must generally arise from an offer made by one party to another and an acceptance by the latter, with the result that one or both are bound by a promise.[8] "The offer consists of a promise, either ex-

[5] Clark, §§ 7–9, p. 12.

[6] The word "promise," as used in this sense, is defined in the Restatement of the Law of Contracts, § 2(1), p. 3, as "an undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future."

[7] Clark, § 11, pp. 14, 15.

[8] However, an offer need not be made to an ascertained person, but

press or implied. The acceptance may consist of—(a) Simple assent; but this applies to contracts under seal only. (b) Giving of a promise. (c) Doing of an act."[9]

As an offer or its acceptance may be made by conduct as well as by words, where the terms of a contract can be inferred from the acts of the parties, the contract is said to be "implied." Such a contract is implied in fact.[10] That is to say, there is an actual agreement evidenced by the conduct of the parties, and hence an "implied" contract is distinct from a "quasi" contract, "which is an obligation imposed by law without regard to the intention of the parties."[11]

As a general rule the requisite offer must be intended to create and capable of creating legal relations, and, as such, an offer is made when it is communicated to the offeree, but before it becomes a binding promise an offer must be: (a) accepted and the acceptance must be absolute and unconditional; (b) identical with the terms of the offer; and, (c) in the mode, at the place, and within the time expressly or impliedly required by the offer. Until its acceptance, an offer may be revoked, except where the offeror has contracted under seal or for a consideration to hold the offer open for a certain time in which case the offer may not be revoked until the expiration of such certain time.[12] But, to

no contract can arise until it has been accepted by an ascertained person. For example, an offer can be made to any one of the public generally, or to any one of a class of persons, who may accept it. "Take, for instance, the case of a proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, such as an advertisement for the return of lost property, or for the apprehension of persons who have committed a crime, or for certain information. This is an offer, to any one who shall accept it, of a promise for an act, and becomes a binding promise to pay the reward as soon as any individual renders the services." Clark, p. 50.

9 Clark, §§ 12–14, p. 16.

10 For example, where an offer contemplates the performance of or forbearance from an act as the consideration of the promise of the offeror, such performance or forbearance constitutes an acceptance, unless the offeror expressly or impliedly prescribes that the acceptance must be communicated. On the other hand, "where the offer contemplates a promise as the consideration of the promise of the offeror, communication of the acceptance is essential, unless the offer contemplates that the performance of some overt act manifesting an intention to accept shall be an acceptance, in which case performance of the act is an acceptance." Clark, § 20, p. 28.

11 Clark, § 16, p. 19.

12 However, an offer will lapse and terminate without express revocation, so that a subsequent acceptance will have no effect: "(a) On the efflux of a time specified for acceptance, or of a reasonable time where no time is specified; (b) On its rejection; (c) On failure of the acceptance to comply with the terms of the offer, which is equivalent to rejection; (d) On the death or insanity of either party before acceptance." Clark, § 25, p. 47.

prevent an acceptance of an offer from being effective, notice of revocation must have been communicated to the offeree as an acceptance may take effect at the moment it is dispatched.[13]

Same; Classification of Contracts

Contracts are classified as: (1) formal contracts; or, (2) simple or parol contracts. Formal contracts are those which are dependent for their validity upon their form alone and are either: (a) contracts of record; or, (b) contracts under seal. Simple or parol contracts are divided into: (a) contracts which are dependent for their validity on both their form and the presence of consideration, that is contracts not under seal nor of record but which are required by law to be in writing, either with or without a particular form; and, (b) contracts which are dependent for their validity upon the presence of consideration alone, no form at all being required.

The formal contracts which are termed "contracts of record" are: (a) Judgments of courts of record, whether entered by consent or rendered in invitum (against an unwilling party). In the latter case, however, the obligation is quasi contractual, not contractual.[14] (b) Recognizances, which are obligations entered into before a court of record to do or forbear from doing a certain thing under a penalty.[15]

Contracts under seal, called "deeds" and "specialties," derive their validity at common law from their form alone and not from the fact of agreement or consideration. The term "deed" is usually used to denote a conveyance of land but it applies as well to other contracts under seal. "Particular contracts under seal,

13 For example, "where the offer contemplates the dispatch of an acceptance by means beyond the acceptor's control, as by post, telegraph, or the offeror's messenger, an acceptance so dispatched is effective from the time of dispatch, unless the offeror makes the formation of the contract dependent upon actual communication to himself." Clark, § 21, p. 28.

14 For example, a judgment of a court of record awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. If entered with the consent of the parties, the judgment has the features of a contract; but if entered without the consent of the person bound, the judgment is quasi contractual.

15 For example, to appear at court as a witness, or for trial, or to pay a debt.

deeds, or specialties are: (1) Grants or conveyances of land, in which the parties are called respectively 'grantor' and 'grantee;' (2) bonds, which are obligations conditioned upon payment of money, or the doing or forbearance from doing some act, the parties to a bond being called respectively 'obligor' and 'obligee;' and (3) covenants, which are agreements between two or more persons, entered into by deed—that is, under seal—whereby one or more of them promises the other or others the performance or nonperformance of certain acts, or that a given state of things does or shall or does not or shall not exist, the parties being called respectively 'covenantor' and 'covenantee.' "[16]

A deed or specialty must be in writing, sealed, delivered, and possibly signed. It takes effect from the date of its delivery. The chief characteristics of such a contract are: "(a) The recitals are conclusive against the parties. They are said to be estopped thereby. (b) It merges a prior simple contract. (c) A right of action is not barred until the lapse of a longer time than in case of simple contracts. (d) No consideration is necessary."[17] However these generalities are subject to the following exceptions: "(1) Contracts in partial restraint of trade, though under seal, require consideration. (2) Where there was a consideration, it may be shown to have been illegal or immoral. (3) Courts of equity will not specifically enforce a deed without consideration. (4) By statute in some states the distinction between sealed and unsealed instruments is abolished, while in others a seal is merely declared presumptive, but rebuttable, evidence of a consideration."[18]

At common law a contract under seal is necessary: "(a) Where the promise is without consideration. (b) Formerly, corporations could only contract under seal, with some few exceptions; but with us they can make contracts which they have the power to enter into in the same manner as a natural person, unless restricted by charter. (c) Conveyances of land are in most jurisdictions required to be under seal."[19]

Same; Requirement of Writing; Statute of Frauds

At common law bills of exchange and promissory notes must be in writing; and, by statute in some states, writing is declared necessary for the following contracts: (1) acceptance of a bill of exchange or other order for the payment of money; (2) acknowledgment of a debt barred by the statute of limitations; and, (3) a new promise by an infant after he has attained his majority. In addition, by the Statute of Frauds, writing is necessary in certain other specified contracts.

16 Clark, p. 67.

17 Clark, § 34, p. 75.

18 Clark, § 34, p. 75.

19 Clark, § 35, p. 80.

The fourth section of the English Statute of Frauds,[20] substantially followed in most of the states enacts that, "No action shall be brought, (a) whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (b) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; (c) or to charge any person upon any agreement made upon consideration of marriage; (d) or upon any contract or sale of lands, tenements, or hereditaments, or any interest concerning them; (e) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The writing must show: (1) the names or descriptions of the parties; (2) the terms and subject-matter of the agreement; and (3) the consideration, in most of the states. Failure to comply with the statute does not render the contract void but merely precludes enforcement by suit.

Same; Consideration

The term "consideration," is defined as, "that which moves from the promisee or a third person, at the request of the promisee, to the promisor or a third person designated by the promisor, at the express or implied request of the latter, in return for his promise."[21] As used in the law of contracts the term consideration means a "valuable" consideration, something having value in the eyes of the law, and every simple contract is required to be based on what the law deems to be a valuable consideration.[22] Hence, the consideration necessary for a contract is the price bargained and paid for a promise, but it may consist of a return promise, an act, a forbearance, or a change of legal relations.

20 29 Car. II, c. 3, 1676. See Clark, § 39, p. 87.

21 Clark, § 62, p. 147.

22 Exception. Want of consideration will not avoid a negotiable instrument in the hands of a bona fide purchaser for value.

The validity of a contract is not dependent upon the adequacy of the consideration to the promise, provided the consideration is something of value in the eyes of the law; but it must not be illusory or unreal, some benefit must be conferred on the promisor or a person designated by the promisor, or some detriment suffered by the promisee or by a third person at the request of the promisee. However, in equity inadequacy of consideration if it is such as to be evidence of fraud is ground for the refusal of specific performance, and inadequacy of consideration is regarded as corroborative evidence in suits for relief from contracts on the ground of fraud and undue influence.

A consideration may be executory or executed but generally it cannot be past except: "(a) Where the past consideration was given at the request of the promisor. (b) Where the promise is to pay for something voluntarily done by the promisee, which the promisor was legally bound to do. (c) Where a person, by a new promise, revives an agreement by which he has benefited, but which is not void, but voidable or unenforceable against him, by reason of a rule of law, meant for his advantage, which he may waive."[23] Of course the consideration, to support a promise, must be legal.

Same; Reality of Consent

It is essential to every agreement that there be mutual assent in legal contemplation. Hence, an agreement may be rendered void or voidable because the apparent assent was the result of mistake, misrepresentation, fraud, undue influence, or duress.

Mistake occurs where the parties did not mean the same thing, or where one or both, while meaning the same thing, formed untrue conclusions as to the subject-matter of the agreement. It avoids the contract in the following cases: "(a) Where the mistake is as to the nature of a written contract, the execution of which is induced or procured by misrepresentation; (b) Where the mistake is as to the identity of the person with whom the contract is made; (c) Where the subject-matter of the contract, unknown to the parties, does not exist; (d) Where two things have the same name, and the parties, owing to the identity of names, do not mean the same subject-matter." [24]

Misrepresentation is an innocent misstatement or nondisclosure of material facts and, "according to the weight of modern authority, both at law and in equity, the injured party may rescind his contract because of an innocent misrepresentation of a material fact by the other party to the contract." [25]

[23] Clark, § 81, p. 186.

[24] Clark, § 133, p. 265.

Fraud is a false representation of a material fact, or nondisclosure of a material fact under such circumstances that it amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury. "As a general rule fraud renders a contract, not void, but merely voidable at the option of the party injured. Therefore, (a) He may affirm the contract, and sue for damages for the deceit, or, if sued on the contract, set up the fraud in reduction of the demand. (b) He may rescind the contract, and (1) Waive his damages for the deceit; (2) Sue to recover what he has parted with; (3) Resist an action at law on the contract; (4) Resist a suit in equity for specific performance, or (5) Sue in equity to have the contract avoided judicially." [26]

Undue influence, a species of fraud, may be said generally to consist "(a) In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.[27] (b) In taking an unfair advantage of another's weakness of mind. (c) In taking a grossly oppressive and unfair advantage of another's necessities and distress." [28] The effect of undue influence is to render the contract voidable at the option of the injured party.

Duress is actual or threatened violence or imprisonment by virtue of which a person is forced to enter into a contract. To affect a contract, however, "(a) It must have been against or of the contracting party, or his or her wife, or husband, parent, child, or against a third person under such circumstances as to deprive the contracting party of his freedom to contract. (b) It must have been inflicted or threatened by the other party to the contract, or by one acting with his knowledge or on his behalf. (c) It must have induced the party to enter into the contract." [29] Further, by the weight of modern authority, the unlawful detention of the goods or chattels of another under op-

[25] Clark, § 138, p. 281.

[26] Clark, § 142, p. 315.

[27] For example, guardian over ward; trustee over his cestui que trust.

[28] Clark, § 147, p. 333.

[29] Clark, § 144, p. 325.

pressive circumstances or their threatened destruction may constitute duress. Ordinarily the effect of duress is to render the contract voidable at the option of the person coerced.

Same; Legality of Object

An agreement is not enforceable at law and consequently does not result in a contract if its object is illegal. To result in a contract an agreement must create an obligation, and no obligation is created if the agreement is such that the courts cannot enforce it. As a rule the law does not interfere with the freedom of persons to enter into contracts, but some limitations are imposed and certain objects are forbidden and although all the other elements necessary to the formation of a valid contract may be present, yet, if one forbidden object is contemplated by the parties, the courts will not enforce their agreement.

For convenience unlawful agreements may be classified according to their objects as: (1) agreements in violation of positive law; and, (2) agreements contrary to public policy. An agreement in violation of positive law is one which involves the doing of an act which is positively forbidden by law, or the omission to do an act which is positively enjoined by law. Acts may be so prohibited or enjoined: (a) by the rules of the common law; or, (b) by statute.

Agreements which are illegal and void because in breach of rules of the common law are: (1) agreements involving the commission of crime; and, (2) agreements involving the commission of a civil wrong. Examples of the latter kind are agreements to divide the profits of a fraudulent scheme, or to carry out some object in itself unlawful by means of a trespass, breach of contract, or breach of trust. Such objects although not necessarily criminal are contrary to positive law.

Agreements may be illegal and void because their objects are prohibited by statute, as a legislature in the exercise of its police power may regulate or prohibit the making of contracts. In determining whether a contract or an act or omission involved in the performance of a contract is prohibited by statute, the intention of the legislature must be ascertained and must govern; and in ascertaining the intention the court will look to the language and subject-matter of the statute, and the evil which it seeks to prevent. "Subject to this fundamental rule, the following rules of construction, which are frequently applied, may be stated: (a) Where the statute imposes a penalty for an act or omission, this is prima facie evidence of intention to prohibit. (b) If the

object of the penalty is protection of the public, it amounts to a prohibition; but if the object is solely for revenue purposes, the act or omission is not prohibited." [30] The following are examples of the most common statutes prohibiting agreements: "(a) Statutes regulating the conduct of a particular trade, business, or profession, or regulating dealings in particular articles of commerce. (b) Statutes regulating the traffic in intoxicating liquors. (c) Statutes prohibiting labor, business, etc., on Sunday. (d) Statutes prohibiting the taking of usury. (e) Statutes prohibiting gaming and wagers. This head includes statutes prohibiting the buying and selling of stocks or commodities for future delivery, where the parties intend, not an actual delivery, but a settlement by paying the difference between the market and the contract price. (f) Statutes prohibiting lotteries." [31]

As for agreements contrary to public policy, any agreement that is such, "because of its mischievous nature or tendency, is illegal and void, though the acts contemplated may not be expressly prohibited either by the common law or by statute. The test of public policy must be applied in each case as it arises, and therefore agreements which have been or may be declared contrary to public policy cannot be exactly classified. The most general are: (a) Agreements tending to injure the public service. (b) Agreements involving or tending to the corruption of private citizens with reference to public matters. (c) Agreements tending to pervert or obstruct public justice. (d) Agreements tending to encourage litigation. (e) Agreements of immoral tendency. (f) Gambling transactions. (g) Agreements tending to induce fraud or breach of trust. (h) Agreements affecting the freedom or security of marriage, or otherwise in derogation of the marriage relation. (i) Agreements in derogation of the parental relation. (j) Agreements in unreasonable restraint of trade, including combinations to prevent competition, control prices, and create monopolies. (k) Agreements exempting a person or corporation from liability for negligence." [32]

Where an agreement is illegal in part only, the part which is legal may be enforced provided it can be separated from the part which is illegal, but not otherwise. In detail: "(a) An indivisible promise to do several acts, some of which are illegal, or a single promise to do a legal act, based on several considerations, one of which is illegal, is wholly void. (b) But where distinct prom-

[30] Clark, § 154, p. 350.
[31] Clark, § 155, p. 354.
[32] Clark, §§ 156, 157, p. 380.

ises, some of which are good, are based on a good consideration, or where there are distinct promises based on several distinct considerations, some of which are good, the good promises, or promises based on good considerations, may be enforced." [33]

If an agreement is wholly unlawful, the general rule is that an action cannot be maintained to enforce it. And, where an illegal agreement has been executed in whole or in part by the payment of money or the transfer of other property, the court will not generally lend its aid for the recovery thereof. "The rule is that the court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction. This rule is subject to exceptions as follows, [however], where the action is brought, not to enforce the agreement, but in disaffirmance of it: (a) In some cases a locus poenitentiae [opportunity for repentance] remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered. (b) Where the parties are not in pari delicto [in equal fault], the one who is less guilty may recover what he has parted with, as (1) Where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure. (2) Where the law which makes the agreement unlawful was intended for the protection of the party asking relief." [34] Generally, a broker or other agent hired to carry out an illegal transaction cannot recover compensation or indemnity in respect to the transaction, if he was a privy to his employer's unlawful purpose; and no recovery may be had upon a quantum meruit or quantum valebant for benefits received under an illegal contract.[35]

Operation of Contract; Limits

Generally a contract cannot impose liabilities on a person who is not a party to it. "A contract, however, between master and servant at least, imposes a duty on third persons not to interfere maliciously with its performance by inducing the servant to break it, and for a violation of this duty an action will lie. Many courts hold that the doctrine applies to all contracts." [36] On the other hand, a contract cannot as a rule, confer rights on a person who is not a party to it but this rule is subject to certain apparent exceptions. Thus, "(1) If the contract is such as to constitute the promisor trustee for the benefit of the third person, the latter may sue in equity. (2) Where money or other property has come into the promisor's hands by virtue of the contract, for the use of the third person, the law creates a so-called contract between him and such third person, on which the latter may sue." [37] Further, in many of the states, an exception is also made to this rule in the case of a promise made for the benefit of a third person, the latter being allowed to sue thereon. In some of these states, however, there must be such a relation between the promisee and the person for whose benefit the promise is made as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the former to the latter.

[33] Clark, § 178, p. 456.

[34] Clark, § 186, pp. 473, 474.

[35] "Where money is paid, goods are sold, or services are rendered, under a contract merely void, but not illegal, an implied assumpsit lies for the money paid, or for the value of the goods sold or services rendered; but where the contract is illegal because contrary to positive law or against public policy, an action does not lie to recover the money paid on it, or the value of the goods sold or services rendered under it. To permit a recovery upon a quantum meruit or quantum valebant for benefits received under an illegal contract would result in the indirect enforcement of the contract itself, and, to a large extent at least, would relieve it of any odium of inconvenience, whereas it is the policy of the law to discourage the making of illegal agreements." Clark, p. 482.

Same; Assignment by Act of Parties

Under some circumstances a contract may be assigned. That is, a person not a party to a contract may take the place of one of the parties. And an assignment may be either by the voluntary act of the parties or by operation of law. Generally, however, a person cannot assign his liabilities under a contract, but this rule is subject to the following apparent exceptions: "(a) He may so assign with the consent of the other party to the contract. (b) In contracts to do work involving no personal skill or personal qualifications, the party may have the work done by another, but he remains liable if it is not properly done. (c) When an interest in land is transferred, certain liabilities attaching to the enjoyment of the interest pass with it." [38]

At common law rights arising out of a contract cannot be assigned except: (1) by an agreement between the original parties and the intended assignee, and which is subject to all the rules for the formation of a valid contract; and, (2) by the rules of the law merchant in the case of negotiable instruments. However, an assignment in equity is so far recognized at common law as to permit the assignee to sue thereon in the name of the assignor or his representatives, and at the present time in most

[36] Clark, § 193, p. 491.

[37] Clark, p. 494.

[38] Clark, § 197, p. 507.

states there are statutes allowing the assignment of choses in action and a suit at law by the assignee in his own name. In equity, on the other hand, a contract may be assigned whenever the contract is not for exclusively personal services and does not involve personal credit, trust, and confidence; but notice is necessary to bind the debtor or person liable and the assignee takes subject to all such defenses as would have prevailed against the assignor.

Same; Assignment by Operation of Law

Rules of law operate to transfer rights and liabilities arising out of contract under certain circumstances and to a certain extent upon the transfer of an interest in land; upon a woman's marriage; by death; and by bankruptcy. Thus, "if a person, by purchase or lease, acquires an interest in land from another, on terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest will operate as a transfer of these obligations to the assignee as follows: (a) Covenants affecting leasehold interests, (1) If they touch and concern the thing demised, and relate to something which was in existence at the time of the lease pass to the assignee, though not expressed to have been made with the lessee 'and his assigns.'[39] (2) If they relate to something not in existence at the time of the lease, they pass to the assignee, if expressed as made with the lessee 'and assigns.' (3) In no case do merely personal or collateral covenants between the landlord and lessee pass to the latter's assignee. (4) The reversioner or landlord does not at common law, by assigning his interest in the land, convey his rights and liabilities to the assignee, but this is very generally changed by statute. (b) Covenants affecting freehold interests, (1) If made to the owner of the land, and for his benefit, pass to his assignees, provided they touch and concern the land, and are not merely personal.[40] (2) If made by the owner, restricting his enjoyment of the land, they do not, at common law, bind his assignees, except in case of well-known interests, such as easements, recognized by law. In equity, however, it is otherwise in case of certain covenants of which the assignee had notice at the time of his purchase." [41]

[39] For example, a covenant to repair, or to leave in good repair, or to deal with the land in any specified manner.

[40] For example, if the vendor of land covenants with the purchaser that he has a good right to convey the land, the benefit of the covenant will pass to any assignee of the purchaser.

[41] Clark, § 202, pp. 523, 524.

At common law, as the result of marriage, the woman's right to reduce her choses in action into possession was transferred to her husband and he became liable jointly with her, during coverture, upon her antenuptial contracts. However, these rules are now changed by statute in all jurisdictions.

Death passes to the executors or administrators of the deceased all rights of action in respect of the personal estate, and to the extent of his estate, all liabilities chargeable upon it. However, contracts depending on the personal services or skill of the deceased and contracts the breach of which involve a purely personal loss are not included in the rule.

Bankruptcy has the effect of passing to the trustee of the bankrupt the rights and liabilities under the bankrupt's contracts to the same extent that they would pass to his personal representative upon his death.

Same; Joint and Several Contracts

A contract in which there are two or more parties on either or both sides may be either joint, several, or joint and several, depending upon the intention of the parties as manifested by their agreement.[42] The common-law rules (now modified to a considerable extent by statute in most jurisdictions) that govern the operation of contracts after such intention has been determined are as follows: (1) Where several parties join in a promise: "(a) They are each liable for the whole debt or performance. (b) They are jointly, and not separately, liable, and must all be sued jointly. (c) Where one of them dies, the liability devolves upon the survivors, and, on the death of all, upon the personal representative of the last survivor. (d) A release of one, by act of the promisee, releases all." [42a] (2) Where a promise is made to several jointly: "(a) They are entitled jointly, and not separately, and must join in a suit on the promise. (b) Where one of them dies, the legal right devolves upon the survivors, and on

[42] In determining whether or not the parties to a contract intended it to be joint or several, the following rules are applied: "(a) A promise by two or more in the plural number is prima facie joint, while a promise in the singular is prima facie several; but this presumption will yield if, from the whole agreement, a contrary intention appears. (b) Subscriptions by a number of persons to promote some common enterprise, though joint in form, are several promises. If the words will admit of it, the contract, as regards the promisees, will be joint or several, according as their interest is joint or several." Clark, § 228, p. 573.

[42a] Clark, § 207, p. 532.

them alone." [43] (3) If two or more parties bind themselves severally to another for the same matter or debt, their liability is separate and distinct and they cannot be sued jointly. (4) If one party binds himself to several parties severally, their rights to enforce the promise are separate. (5) Where a contract in respect of the promisors is both joint and several: "(a) The promisee may sue all the promisors jointly, or each one separately. (b) If he sues jointly, he must sue all the promisors; he cannot sue less than all jointly." [44] (6) Where one of several joint debtors pays the whole debt, he may, in the absence of an agreement to the contrary, enforce what is termed "contribution" from the others; that is, he may recover from them their proportionate shares of the debt.

Rules of Construction

Whether or not the parties have made a particular contract is usually a question for the jury, but questions as to the construction of the contract are usually for the judge. "The three general rules of construction are that: (a) Words are to be understood in their plain and literal meaning, but—Exceptions—(1) Evidence of usage may vary the usual meaning of words. (2) Technical words are to be given their technical meaning. (3) The rule is subject to the following rules as to giving effect to the intention of the parties. (b) An agreement should receive that construction which will best effectuate the intention of the parties. (c) The intention of the parties is to be collected from the whole agreement." [45] Subsidiary to these rules but directed to the same object, that is effecting the intention of the parties, are the following: "(a) Obvious mistakes of writing or grammar, including punctuation, will be corrected. (b) The meaning of general words will be restricted by more specific and particular descriptions of the subject-matter to which they apply. (c) A contract susceptible of two meanings will be given the meaning which will render it valid. (d) A contract will, if possible, be construed so as to render it reasonable rather than unreasonable. (e) Words will generally be construed most strongly against the party who used them. (f) In case of doubt, weight will be given the construction placed upon the contract by the parties. (g) Where there is a conflict between printed and written words, the latter will control." [46]

[43] Clark, § 208, p. 532.

[44] Clark, § 211, p. 536.

[45] Clark, § 223, p. 557.

[46] Clark, § 224, p. 557.

Discharge of Contract; Remedies on Breach of Contract

A contract may be discharged by agreement, performance, breach, impossibility of performance, or by operation of law. However, "where a contract is broken in a material respect by one of the parties, the other party acquires, or may acquire, three distinct rights: (a) He may be discharged from further performance. (b) If he has done anything under the contract, he has a right to sue on the quantum meruit, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law. (c) He has a right of action on the original contract, or term of the contract broken and may maintain: (1) A suit to obtain damages for the loss sustained by the breach. (2) A suit to obtain specific performance of the contract by the other party." [47] Generally, however, a suit in equity for specific performance cannot be maintained if there is an adequate remedy at law; or if the matter of the contract is such that the court cannot supervise performance; or if the enforcement of specific performance would be inequitable and unjust.

QUASI CONTRACTS

81. A quasi contract is an obligation imposed by law without regard to the intention of the parties.

As defined, a quasi contract is distinguishable from an implied contract or one the terms of which are inferred from the acts of the parties and which is based on an actual agreement evidenced by their conduct. Ordinarily a person can maintain an action ex contractu (from or out of a contract) against another only by proving a contract in fact. However, there are circumstances under which the law will create a fictitious promise for the purpose of allowing such an action, and the obligation thus imposed is termed a "quasi" contract. These obligations fall into three classes: (1) obligations founded upon a record such as a judgment; (2) obligations founded upon a statutory, official, or customary duty; and, (3) obligations founded upon the fundamental principle that no one should be allowed to unjustly enrich himself at the expense of another. Examples of the second class of quasi contractual obligations are those imposed by statutes requiring one county to pay another for money expended in the support of a pauper; statutes allowing actions for the recovery of

[47] Clark, § 263, p. 668.

usury paid; and, statutes allowing actions for the recovery of money lost and paid on wagers. Examples of the third class are those imposed upon several sureties or other joint debtors where one of them pays the whole debt. In such a case, the latter is allowed to recover from each of the others, in a contractual action, his proportionate share.

CHAPTER 18

SPECIAL CONTRACTS

NEGOTIABLE INSTRUMENTS

82. Negotiable instruments are such bills of exchange, promissory notes, and bonds as are payable to bearer, or to the order of a specified person. Also, by statute in many States, bills of lading and warehouse receipts, if running to bearer or to the order of a specified person, are negotiable.[1]

In General

The negotiability of bills of exchange and promissory notes originated in the customs of merchants, was established by the Statute of 3 & 4 Anne, and is now codified in the several States by the Uniform Negotiable Instruments Law (N.I.L.), approved by the Commissioners on Uniform States Laws in 1896. Negotiability is to be distinguished from assignability which pertains to contracts in general and which is the manner that rights evidenced by ordinary contracts are transferred. Assignability differs from negotiability in that an assignment is not complete without notice to the debtor; the assignee can acquire no better title than that of the assignor; the assignee takes title subject to all equities; and suit on the contract must generally be brought in the name of the assignor, except in jurisdictions where this rule has been changed by statute. In the case of a negotiable instrument, on the other hand, a bona fide indorsee's title is good without notice to the debtor, he may sue on the instrument in his own name, he may acquire a better title than that of his indorser, and he ordinarily takes free of all equities.

Form

Under the N.I.L.,[2] "an instrument to be negotiable must conform to the following requirements: 1. It must be in writing and

[1] See Restatement of the Law of Contracts, § 10, p. 9.

[2] Section 1. The various jurisdictions in which this act has been adopted are listed in the appendix.

signed by the maker or drawer; 2. Must contain an unconditional promise or order to pay a sum certain in money; 3. Must be payable on demand, or at a fixed or determinable future time; 4. Must be payable to order or to bearer; and, 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

A contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. "As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." [3]

Rules of Construction

Where the language of a negotiable instrument is ambiguous, or there are omissions therein, the following rules of construction apply: "1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount; 2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof; 3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued; 4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail; 5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election; 6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser; 7. Where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed to be jointly and severally liable thereon." [4]

[3] N.I.L. § 16.

Capacity of Parties

The rules which regulate the capacity of persons for ordinary contracts govern, in general, the capacity of persons as respect negotiable instruments. However, the latter is of two kinds: (1) capacity to incur liability; and, (2) capacity to transfer the instrument. The following classes of persons do not have capacity to incur liability on a negotiable instrument, but they do have capacity to make a valid transfer thereof: (a) persons non compos mentis; (b) infants; (c) married women, in some jurisdictions; and, (d) corporations, when the act is ultra vires. However, "in the United States, private corporations, unless restrained by charter, have capacity to draw, accept, make, and indorse bills and notes." [5] The following persons may transfer negotiable instruments, but generally they can incur only personal liability and cannot bind their estates: (a) executors; (b) administrators; (c) guardians; and, (d) trustees.[6]

Consideration

Every negotiable instrument "is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."[7] The term "value" means, "any consideration sufficient to support a simple contract."[8] And an antecedent or pre-existing debt constitutes "value." The absence or failure of consideration "is a matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."[9]

Definitions of Bills of Exchange, Checks, and Promissory Notes

A bill of exchange is "an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."[10] An "inland" bill of exchange is a bill

[4] N.I.L. § 17.

[5] Norton on Bills and Notes, 4th Ed., (hereinafter cited "Norton"), § 96, p. 288.

[6] See Norton, §§ 31–33, pp. 89, 90.

[7] N.I.L. § 24.

[8] N.I.L. § 25.

[9] N.I.L. § 28.

[10] N.I.L. § 126.

which is, or on its face purports to be, both drawn and payable within the same state. Any other bill is a "foreign" bill. The original parties to a bill are technically termed the "drawer," or the party who orders the payment; the "drawee," or the party to whom the order is addressed; the "acceptor," or the drawee after he has assented to the order;[11] and the "payee," or the party in whose favor the order is made.

A check is "a bill of exchange drawn on a bank payable on demand,"[12] and except as otherwise provided therein, the provisions of the N.I.L. applicable to a bill of exchange payable on demand apply to a check.

A negotiable promissory note, within the meaning of the N.I.L.,[13] "is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer." If a note is drawn to the maker's own order it is not complete until indorsed by him. The parties to a note are technically termed the "maker," who is the person who signs the note and makes the promise, and the "payee," who is the person to whom the promise is made.

Negotiation; Indorsement

An instrument is negotiated "when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."[14] If payable to bearer the instrument may be negotiated by delivery, whereas if it is payable to the order of some person it is negotiated by the indorsement of such person and delivery. Indorsement is defined as "the writing of the name of the indorser on the instrument with the intent either to transfer the title to the same, or to strengthen the security of the holder by assuming a contingent liability for its future payment, or both."[15] Hence, an indorsement operates to transfer title to the instrument and also constitutes a contract between the indorser and subsequent holders. As such, "an indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional."[16] These different kinds of indorsements are defined in the N.I.L.[17] as follows: A

11 "An acceptance is an undertaking by the drawee to pay the bill when due." Norton, § 41, p. 116.

12 N.I.L., § 185.

13 Section 184.

14 N.I.L. § 30.

15 Norton, § 56, p. 148.

16 N.I.L. § 33.

17 Sections 34, 36, and 38.

special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. A restrictive indorsement is one which either: (1) prohibits the further negotiation of the instrument; or, (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. Such an indorsement confers upon the indorsee the right: (a) to receive payment of the instrument; (b) to bring any action thereon that the indorser could bring; and, (c) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so, but all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. A qualified indorsement is one which constitutes the indorser a mere assignor of the title to the instrument and may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. A conditional indorsement, on the other hand, is defined as one "by which the title to the instrument does not pass until the condition mentioned in the indorsement is fulfilled."[18] However, "where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally."[19]

18 Norton, § 63, p. 162.

19 N.I.L. § 39.

Every person who negotiates a bill or note by delivery or indorsement warrants: (a) that the instrument is genuine and in all respects what it purports to be; (b) that he has a good title to it; and, (c) that all prior parties had capacity to contract. And a person who negotiates an instrument by delivery or qualified indorsement further warrants that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. However, when the negotiation is by delivery only the warranty extends in favor of no holder other than the immediate transferee. On the other hand, a person who indorses without qualification, in addition to the first three warranties listed, warrants that the instrument is at the time of his indorsement valid and subsisting. See N.I.L. §§ 65, 66.

Rights of the Holder

A "holder in due course" is defined in the N.I.L.[20] as "a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face; 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Such a holder "holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."[21] In the hands of one other than a holder in due course "a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to the latter."[22]

Liabilities of the Parties

The maker of a negotiable instrument, "by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse;"[23] whereas the drawer of a negotiable instrument "admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder."[24]

An acceptor, on the other hand, by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits: "1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and 2. The existence of the payee and his then capacity to indorse."[25]

20 Section 52.
21 N.I.L. § 57.
22 N.I.L. § 58.
23 N.I.L. § 61.
24 N.I.L. § 60.
25 N.I.L. § 62.

A person placing his signature upon an instrument other than as maker, drawer, or acceptor, is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules: "1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee, [an accommodation party being one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person, and who is liable on the instrument to a holder for value] he is liable to all parties subsequent to the payee."[26] Every indorser who indorses a negotiable instrument without qualification "engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."[27] As respects one another, indorsers are liable prima facie in the order in which they indorse but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to have done so jointly and severally.

Discharge of Negotiable Instruments

Under the N.I.L.[28] "a negotiable instrument is discharged: 1. By payment in due course by or on behalf of the principal debtor; 2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; 3. By the intentional cancellation thereof by the holder; 4. By any other act which will discharge a simple contract for the payment of money; 5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

The person "primarily" liable on an instrument is the person who by the terms thereof is absolutely required to pay the same; all other parties are "secondarily" liable.[29] And a person secon-

26 N.I.L. § 64.
27 N.I.L. § 66.
28 Section 119.
29 N.I.L. § 192.

darily liable on the instrument is discharged: "1. By any act which discharges the instrument; 2. By the intentional cancellation of his signature by the holder; 3. By the discharge of a prior party; 4. By a valid tender of payment made by a prior party; 5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; 6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."[30] However, "where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except: 1. Where it is payable to the order of a third person, and has been paid by the drawer; and 2. Where it was made or accepted for accommodation, and has been paid by the party accommodated."[31]

Negotiable Documents of Title to Goods or Chattels

For the purpose of facilitating sales transactions and credit therefor, the law provides for the use of "negotiable documents of title" to goods or chattels. Such documents are treated of in the Uniform Warehouse Receipts Act, approved by the Commissioners on Uniform State Laws in 1906; in the Uniform Bills of Lading Act, approved by the Commissioners on Uniform States Laws in 1909; and, also, in the Uniform Sales Act. A negotiable document of title is defined in the Uniform Sales Act[32] as "a document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document." Such a document of title may be negotiated by delivery: "(a) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or (b) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer."[33] On the other hand, such a document "may be negotiated by the

30 N.I.L. § 120.

31 N.I.L. § 121.

32 Section 27.

33 Uniform Sales Act, § 28.

indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, or to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner."[34] A person to whom a negotiable document of title has been duly negotiated acquires thereby, "(a) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and (b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him."[35]

SURETYSHIP AND GUARANTY

83. A contract of suretyship is one which secures a creditor or employer against loss caused by the failure of his debtor or employee to perform his duties.

In general

Suretyship has been defined as "the lending of credit to aid a principal who has not sufficient credit of his own."[36] Thus, a surety, in the broad sense, "is a person who is liable for the payment of another's debt or the performance of another's duty. If the obligation of such a person is enforced against him, he is generally entitled to reimbursement from the other person, who ought himself to have performed so that the surety could not have been required to do so. In this sense, the term surety includes what is usually meant where the term guarantor is used."[37] However, in a more restricted sense a surety is a person "who becomes an obligor with another, the terms of his undertaking being the same as those of the other, and the circumstances under which he assumes his obligation being such that, if the surety is required to pay anything, he will be entitled to complete reimbursement;"[38] whereas "a guarantor is one who promises either

34 Uniform Sales Act, § 29.

35 Uniform Sales Act, § 33.

36 Rollings v. Gunter, 211 Ala. 671, 101 So. 446, 1924.

37 Arant on Suretyship (hereinafter cited "Arant") § 4, p. 5.

38 Arant, § 5, p. 5.

that another will perform his duty, or that, if another does not perform his duty, he will, nonperformance by the other being a condition precedent to the guarantor's duty to pay."[39]

In the law of suretyship a "principal" is the person for whose debt or default a surety or guarantor is liable, the term "obligee" being used to denote the creditor or employer to whom both the principal and surety owe their duties. At maturity of the promises of the principal and surety "the creditor can proceed against either by an ordinary suit, and collect any judgment that may be rendered in his favor. He can also realize upon any security received by him from either. In addition, in most American jurisdictions, he can subject to the payment of his debt any security the principal has given the surety for his protection as if the security originally had been given to him instead of the surety."[40]

Surety and Guarantor Distinguished

A surety is distinguishable from a guarantor because the promise of the former is usually, although not necessarily, made jointly and severally with the principal and gives rise to a primary duty; whereas the promise of the guarantor is separate, is expressly conditioned on the principal's failure to perform, and gives rise to a secondary duty. Furthermore, the consideration for the surety's promise is such that he was liable in the action of debt at common law if his principal was so liable, but the only remedy against the guarantor was the action of assumpsit; and, since the promises of the principal and surety are usually joint and several and necessarily in the same terms, they may be sued together, but in the absence of statute the guarantor cannot be sued with his principal.

Suretyship, Guaranty, and Indorsement Distinguished

Contracts of suretyship, guaranty, and indorsement are all accessory, that is, given to secure other promises; but a surety is primarily liable whereas guarantors and indorsers are only secondarily liable. Each is ordinarily entitled to reimbursement from his principal or the primary obligor, upon payment; but a guarantor is liable as soon as the primary obligor defaults whereas the indorser is usually liable only when the holder of the instrument makes an unsuccessful attempt to collect from the party primarily liable at maturity and prompt notice is given of the dishonor.

39 Arant, § 6, p. 7.

40 Arant, § 80, p. 368.

Formation and Construction of Suretyship and Guaranty Contracts

The existence of contracts of suretyship and guaranty and their terms are tested by the general principles of contracts; but in regard to the construction of such contracts, as until comparatively recently a surety was nearly always an individual who assumed the obligation incident to that status simply to accommodate the principal debtor without compensation, it has long been said that the surety is a favorite of the law and his contract strictissimi juris (of the strictest right or law). The attitude thus expressed "seems to have caused some courts, when the language of the promise was ambiguous, to adopt the meaning most favorable to the surety. Others have said that ambiguous language should be construed against the person using it. The rule most widely followed is that a surety's promise is to be construed as is any other contract. When its language is ambiguous, that meaning will be adopted which the surrounding circumstances indicate that it was most reasonable for the promisee to believe the promisor to have intended. If the surrounding circumstances leave the meaning in doubt, that meaning will be adopted which is least favorable to the person who used the language."[41] A compensated surety, on the other hand, has never been regarded as a favorite of the law and the promise of such a surety "is generally said to be in the nature of a contract of insurance, and the rules applicable to the construction of insurance policies applicable to it. Hence, where its language is ambiguous, that meaning is adopted which is most favorable to the promisee. This is generally justifiable because the contract is generally drawn by the surety's attorneys, agents or officers. However, it is not a rule of construction especially applicable to the promises of compensated sureties or insurers, but a rule that is applicable wherever the ambiguous language is chosen by the promisor."[42]

Rights and Liabilities of Sureties

In general, the most important rights and liabilities of a surety are as follows: An unconditional release of the principal debtor by the creditor releases the surety; and, if the creditor has security for the principal's performance of his duty and releases it the surety is discharged to the extent of the value thereof. However, when the creditor releases the principal debtor but reserves his remedies against the surety, the latter is not dis-

41 Arant, § 39, p. 140.

42 Arant, § 40, p. 146.

charged. On the other hand, if the creditor releases one of several cosureties, those not released are discharged to the extent that they, upon payment, might have obtained reimbursement from the surety released.

Where the instrument signed by the surety is materially altered by the obligee after he receives it, the surety is usually discharged unless the instrument is negotiable and in the hands of a holder in due course in which case the surety will be liable to such holder in accordance with the original tenor of the instrument. And, where subsequent to the original agreement the principal and obligee enter into another agreement concerning the same subject-matter, the surety is ordinarily discharged although the terms of the later agreement differ only slightly from those of the first, unless the surety assents to the second agreement before or after it is made; and, if the creditor enters into a binding agreement with the principal debtor to extend the time of payment the surety is generally discharged. However, "courts appear to be adopting rather generally the view that a change does not discharge a compensated surety unless the change causes it injury;"[43] and, "there seems to be a tendency to hold compensated sureties, notwithstanding extensions of time, unless they show that injury has been caused them by the extension agreement."[44]

Concerning the right of a surety to exoneration; the principal owes his surety the duty to perform as soon as performance is due so that the surety will never be liable to a suit by the creditor. Consequently if the principal does not perform at maturity the surety may bring a suit in equity against him and obtain a decree that he pay the creditor. On the other hand, if the surety pays the obligee he has the right to be reimbursed by his principal and may recover the amount by action against his principal.[45]

[43] Arant, p. 264.

[44] Arant, § 68, p. 284.

[45] "When a surety pays his principal's debt he has a right to be substituted to the position of the creditor whom he pays. This is known as the surety's right of subrogation. It is equitable in origin and nature, and formerly was vindicated only by courts of equity. It does not exist until the creditor's claim is fully paid. It entitles the surety to use any remedy against the principal which the creditor could have used, and in general to enjoy the benefit of any advantage that the creditor had, such as a mortgage, lien, power to confess judgment, to follow trust funds, to proceed against a third person who has promised either the principal or the creditor to pay the debt. It also entitles the surety to enjoy any priority that the paid creditor enjoyed. If the obligation was created by a specialty, the surety enjoys the preference of a specialty creditor, and the statute of limitations applicable is that applicable to specialty claims. If the obligee paid is the state, the surety enjoys the state's priority over the other creditors as well as its immunity against the statute of limitations." Arant, § 79, p. 357.

In regard to cosureties; at maturity of the principal's obligation a surety, in a suit in equity, may compel his cosureties to pay to the creditor their proportion of the principal's indebtedness. And when one of several cosureties pays the principal's debt he is entitled to contribution; that is, he is entitled to have his cosureties repay him their proportion of the indebtedness paid.

As respects the right of a surety that the creditor enforce security received from the principal debtor; "at law, it was necessary that the surety pay his principal's debt before he could utilize the creditor's security. In equity, however, if it is necessary for the surety's protection, the creditor may be required to enforce the security received from the principal before proceeding to collect from the surety, if this can be done without enforcing unreasonable delay and expense upon the creditor."[46] Of course the surety is discharged to whatever extent the creditor realizes upon security held by him to secure the debt upon which the surety is liable.

INSURANCE

84. A contract by which one of the parties, for a valuable consideration known as a premium, assumes a risk of loss or liability that rests upon the other, pursuant to a plan for the distribution of such risk, is a contract of insurance.[47]

In general

Definitions of terms in common use in insurance are as follows: The person who undertakes to indemnify another by a contract of insurance is called the "insurer" or "underwriter." The person who obtains insurance upon his property, or upon whose life an insurance is effected, is called the "insured." The written instrument evidencing the contract is called the "policy." The person to whom the policy is payable is called the "beneficiary." The events and causes insured against are termed "risks" or "perils." That which is insured, the life or property interest, is called the "subject-matter" of the contract.

[46] Arant, § 77, p. 352.

[47] See Vance on Insurance, 2d Ed., (hereinafter cited "Vance"), § 23, p. 57.

The distinguishing elements of a contract of insurance are as follows: "(a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable risk. (b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils. (c) The insurer assumes that risk of loss. (d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing similar risks. (e) As consideration for the insurer's promise, the insured makes a ratable contribution to a general insurance fund, called a premium."[48]

Requisites for the Validity of an Insurance Contract

In order that a contract of insurance be valid "it must possess all the essential elements that are requisite to the validity of any other contract; that is: (a) There must be an agreement resulting from an offer and acceptance. (b) In order to be binding, this agreement—(1) Must be in the form required by law. (2) There must be two parties legally capable of contracting. (3) It must be supported by a valuable consideration, unless such consideration be dispensed with by reason of a seal. (4) The purpose of the contract must be legal, and not in contravention of public policy. (c) In addition the insurance contract must be made fairly, the consent of each of the parties being given upon a full knowledge of all material and relevant facts known to the other."[49]

Parties Competent

In the absence of statutory restrictions, any individual, association, or corporation with adequate powers may become an insurer, but it is competent for a state to impose upon all persons granting insurance such conditions as may be deemed necessary for the proper and safe regulation of the business. On the other hand, "in order that a person may be the party insured in an insurance contract, two essential requisites must exist: (a) The person must be competent to make a contract; (b) He must possess an insurable interest in the subject of the insurance."[50]

Different Kinds of Insurance

The chief kinds of insurance are as follows: (a) marine, or that which covers vessels, cargoes, and other property exposed to maritime risks; (b) fire, or that which covers buildings, goods,

48 Vance, § 3, p. 2.
49 Vance, § 34, p. 89.
50 Vance, § 41, p. 108.

and such other objects of property rights as are exposed to injury by fire; (c) life, or that which covers the lives of human beings and domestic animals; and, (d) accident and health insurance, or that which covers persons against injury from accident, or expense and loss of time from disease.

Different Kinds of Policies

Insurance policies differ according to the character of the contract made, and may be classified as follows: (1) As to the amount payable a policy is "valued" or "open," the former being one in which the amount of indemnity to be paid in the event of loss is fixed by the terms of the contract, whereas an open policy is one in which the sum to be paid is not fixed other than by the naming of a maximum liability, but is left to be determined by the parties in the event of loss. (2) As to their subject-matter policies are termed "floating," "running," or "blanket" policies, such a policy being one where the property covered is constantly changing, as in the case of a stock of merchandise in a mercantile establishment. (3) As to duration, marine policies are either "time" or "voyage," a time policy being one in which the duration of the risk is fixed for a definite period of time, whereas a voyage policy is one that insures a vessel or its cargo during a certain voyage, as from New York to Glasgow. (4) Life policies are known chiefly as "regular," "tontine," "endowment," "joint," and "survivorship" policies. A "regular" life policy is one which requires the payment of fixed premiums annually throughout life and which becomes payable only on the death of the insured. A "tontine" policy is one of a class which is entitled to certain benefits only in case it shall continue in force for a given period or shall survive others in the same class, those of the class lapsing going to enhance the value of those remaining in force. An "endowment" policy is one payable at the end of a certain period if the insured survives such period, or upon the death of the insured in case he dies before the end of the period. A "joint" life policy is one under which there is an agreement that the premium shall be paid during the joint lives of the persons insured, the policy maturing and becoming payable upon the death of any one of those jointly insured. A "survivorship" policy, on the other hand, is one that is payable upon the death of the survivor of several joint lives.

The Premium

The premium is the periodical sum paid by the insured for the protection furnished by the insurance contract. In the case of

life insurance the amount of the premium is fixed by reference to established mortality tables which show the expectancy or probable length of life of the insured. "When the risk has once attached the whole premium is deemed to be earned, and no portion thereof is returnable, in the absence of a stipulation to the contrary, even though the risk may terminate before the expiration of the term contracted for, unless—(a) Such termination is due to the wrong of the insurer, or (b) Such return is required by statute. When the risk has never attached, the premium paid is always returnable unless—(a) The contract was rendered void ab initio by the fraud of the insured, or (b) The contract is illegal, and the parties in pari delicto."[51]

Assignability

An insurance contract is essentially personal, "each party having in view the character, credit, and conduct of the other. The contract contemplates the payment of money by one to the other, in order to make good a loss that may be suffered with reference to the interest that may be insured. The performance of the insurer's promise does not ordinarily affect in any wise the insured's legal relations with respect to the land or other thing that may be covered. Hence: (a) The contract of insurance is not attached to the property which is the subject of the insurance, nor does it run with it to a transferee. (b) A policy of fire insurance cannot pass by express assignment to the transferee of the property insured without the assent of the insurer, but, by reason of the custom of merchants, a marine policy may be assigned to the insured's successor in title without reference to the assent of the insurer unless such assignment is expressly forbidden by the policy. (c) After loss suffered, a fire policy, as well as a policy of any other kind, becomes a mere money claim, and is as freely assignable as any other chose in action. (d) A life policy is a contingent chose in action, which, in the absence of stipulation to the contrary, is assignable without the assent of the insurer."[52]

Insurable Interest

The term "insurable interest," in its broadest sense, is applied to that interest "which the law requires a person making a contract of insurance to have in the thing or person insured in order that the contract creating rights and duties so highly dependent upon chance may escape the condemnation visited upon wagers.

[51] Vance, §§ 92, 93.

[52] Vance, § 28, p. 69.

In defining the term in a narrowed sense, it is necessary to make a sharp distinction between contracts relating to destruction of or damage to property, and those relating to the death or injury of persons."[53]

A person is generally regarded as having an insurable interest in property "when he sustains such relations with respect to it that he has a reasonable expectation, resting upon a basis of legal right, of benefit to be derived from its continued existence, or of loss or liability from its destruction. More specifically, an insurable interest exists in the following cases: (a) When the insured possesses a legal title to the property insured, whether vested or contingent, defeasible or indefeasible. (b) When he has an equitable title, of whatever character and in whatever manner acquired. (c) When he possesses a qualified property or possessory right in the subject of the insurance, such as that of a bailee. (d) When he has mere possession or right of possession. (e) When he has neither possession of the property, nor any other legal interest in it, but stands in such relation with respect to it that he may suffer, from its destruction, loss of a legal right dependent upon its continued existence."[54]

Public policy is contravened by a contract of life insurance not supported by an insurable interest, and such a policy is consequently void. However, "the existence of an insurable interest at the time when the policy is issued is sufficient. The subsequent termination of such interest before the maturity of the policy in no wise affects its validity. Every person has an insurable interest in his own life, and may lawfully insure it for the benefit of his own estate, or in behalf of any other person. It is not necessary that such beneficiary shall possess an interest in the life insured."[55]

In regard to insuring the life of another, "the older cases justify the statement that a person may procure insurance on the life of another only when he is so related to that other by reason of blood, marriage, or commerce that he has well-grounded expectations of deriving pecuniary benefit from the continuation of that other's life, or of suffering detriment or incurring liability through its termination. But numerous judicial declarations and some recent decisions lay down the rule that near blood relationship alone, without expectation of pecuniary benefit, existing between the person procuring the policy in good faith and

[53] Vance, § 47, p. 118.

[54] Vance, § 50, p. 124.

[55] Vance, §§ 52–54, p. 147.

the life insured, is sufficient to validate the contract."[56] However, the consent of the person whose life is so insured should be obtained as, "while the practice of insurers makes the question somewhat uncertain, it seems that both by reason and authority insurance written upon the life of one who has not consented thereto is contrary to public policy, and void."[57]

Marine Insurance

Generally a marine insurance policy covers any property that comes reasonably within the words of description used and that may be exposed to the perils insured against; and, by express agreement, freight or passenger money to be earned by the vessel, or profits to be made on the cargo, may be included. The duration of the risk and the time when it attaches depend upon the agreement of the parties as expressed in the policy and as interpreted in the light of the circumstances and usages with reference to which the contract was made. The underwriter or insurer is liable for all losses proximately caused by the perils insured against. However, "there are implied in every insurance upon any marine venture, whether of vessel, cargo, or freight, three conditions upon the underwriter's liability for the risks assumed, usually termed 'implied warranties.' That is, the insurer will not be liable for any loss under his policy in case the vessel (1) is unseaworthy at the inception of the insurance, or (2) deviates from the agreed voyage, or (3) engages in an illegal venture."[58]

Fire Insurance

Under a fire insurance policy the direct loss or damage for which the insurer generally contracts to give indemnity consists of all such injuries as are proximately due to the action of a hostile fire. "These include not only damage done by actual ignition, but also such as results from charring, scorching, smoke, water used in quenching the fire, or from the hasty efforts to remove the goods insured to a place of safety."[59] Fire is said to be the "proximate cause" of a loss when that loss has been caused by a force set in motion by fire, without the intervention of any new and independent force; and a fire is "hostile" when it burns in a place or manner not intended.

56 Vance, § 55, p. 147.

57 Vance, § 58, p. 171.

58 Vance, § 240, p. 844.

59 Vance, § 201, p. 750.

Accident Insurance

Accident insurance is similar in most respects to life insurance, the same rules of law applying to the making of an accident insurance contract and to its construction when made as are applicable to life insurance. Policies of accident insurance, in many varying forms, provide indemnity for "accidental injury" or for "bodily injuries" resulting from "violent, external, and accidental means." Within the meaning of these policies: "(1) Any injury which is unintended, unexpected and unusual is deemed an 'accidental injury,' even though it results from acts or events that were intentionally done. (2) Any injury is 'effected by accidental means' when any act, event or condition in the line of proximate causation bringing about that injury was, from the standpoint of the injured person, unintended, unexpected, unusual or unknown. The dominant factor in effecting the injury may be (a) The act of the insured or of another person done with the insured's consent, which may be (1) intended, (2) unintended; (b) The act of another person, whether intended or not, done without the consent of the insured. (3) Any unintended acts of the insured are deemed accidental. These include acts done while insane. (4) Intended acts of the insured are not considered to be 'accidental means' causing an injury suffered, even though that injury is wholly unintended and unexpected, unless the intended act, (a) Because of slip or misadventure, was done in a manner not intended, or (b) Was done in ignorance of the existence of unusual conditions which caused unexpected injurious consequences to ensue."[60] In both of the latter cases, the injury is held to result from accidental means. Under the rules last stated, "the insurer is liable, in the absence of effective express limitations, or exceptions to the contrary, for injury or death inflicted on the insured: (a) By his own hand while insane; (b) By taking of poison by mistake; (c) By overdoses of drugs administered or taken by mistake or in ignorance of material pathological conditions; (d) By unexpected bacterial infection consequent upon the doing of certain acts, even though such acts were intentionally done."[61] An additional category of injuries within such policies is that which includes injuries caused to the insured by the acts of another person done without the consent of the insured, whether intentionally or unintentionally, unless such injurious acts were provoked and should have been expected by the insured. Under this principle, in the absence of effective express limitations or exceptions to the contrary, the insurer

60 Vance, p. 869.

61 Vance, p. 869.

is liable for the injury or death of the insured in battle or by the unprovoked private violence of another.

It frequently occurs that the death of the person insured under an accident policy expressly excepting injuries and death from disease is immediately caused by some disease induced by an accidental injury. In such a case, "if the circumstances are such as to make the accident, and not the disease, the proximate cause of the death, the insurer is liable as for death due to accidental means."[62]

As respects total disability the liability of the insurer is fixed exclusively by the terms of the policy. And total disability upon which certain payments are usually conditioned exists as a rule when the injury is such that it prevents the insured from engaging in his customary occupation. This rule, however, may be varied by the terms of the insurance contract.

Beneficiaries under Life Policies; Interests and Rights

The beneficiary under a life insurance policy is the person designated by the terms of the contract as the one who shall receive the proceeds. Such beneficiary may be "(a) The person insured or his personal representatives. (b) Some one other than the insured, who may be (1) The assured, or the one procuring and maintaining the contract, (2) One whom the insured, for a valuable consideration, has designated as beneficiary, or (3) One whose nomination as beneficiary is due to mere bounty of the insured. The term as ordinarily used includes only third persons designated as beneficiaries by the party insured."[63]

The legal interests of life insurance beneficiaries vary greatly with the terms of the different contracts. However, generally they may be: (1) vested, either absolutely, or conditionally, subject to being divested by the happening of some condition subsequent; or they may be, (2) contingent upon the happening of some condition precedent; or, (3) mere expectancies, or possibilities of benefits to be received.

When the person insured survives a beneficiary who is absolutely designated in a policy that makes no provision for such a contingency, "the prevailing view is that the interest of the deceased beneficiary remains beyond the control of the insured and becomes assets of such beneficiary's estate. But an increasing number of courts now hold that a trust results to the insured, as

62 Vance, § 259, p. 880.

63 Vance, § 142, p. 537.

upon a failure of the trust declared for the beneficiary, whose death defeated the purpose of the declaration."[64]

As respects the effect of divorce, "in the absence of statute changing the common-law rule, the divorce of a beneficiary from the insured does not terminate her right in a policy payable to her without condition."[65]

In regard to the effect of murder, "when the beneficiary feloniously takes the life of the insured, he thereby loses all interest in the insurance money. In case the policy was procured by the beneficiary as promisee, the insurer's duty to pay is extinguished; but if the beneficiary was but a third party payee designated in a policy procured by the insured, the insurer's duty to pay is not extinguished, but shifts by way of resulting trust to the personal representative of the insured. The felonious beneficiary is also barred from taking any interest in the insurance money under the statutes of distribution."[66]

Rights of Creditors of the Insured

As a rule, general creditors of the insured have no rights in the latter's insurance on property prior to the happening of a loss, but after a loss has occurred the claim of the insured becomes a mere chose in action which is subject, like any other chose, to be seized for the satisfaction of his creditors. However, by the weight of authority, the proceeds of insurance upon exempt property are also exempt.

Life insurance policies which are payable to the insured or his estate are subject to the claims of his creditors, when matured, unless exempted by statute, but "such policies, before maturity, are to be deemed assets for the payment of debts only when by their terms, or by the practice of the insurer, they possess a fixed money value."[67] On the other hand, in the absence of contrary statutes, the insured has no interest in policies payable absolutely to third persons as beneficiaries which his creditors can reach except: (a) where the beneficiary became such by voluntary assignment of a policy payable to insured's estate after the insured incurred the indebtedness; (b) where premiums have been paid with money embezzled from the creditor; or, (c) where premiums have been paid by the insured while insolvent.

64 Vance, § 154, p. 592.

65 Vance, § 155, p. 596.

66 Vance, § 156, p. 598.

67 Vance, § 161, p. 614.

Construction of Insurance Policies

The general principle of construction applied by the judiciary to all contracts of insurance is, that while like other contracts they are to be so construed as to give effect to the intention of the parties, yet, "where there exists any doubt as to that intention it is always to be resolved strictly against the insurer and in favor of the insured. [And], despite the fact that in some states insurance contracts are required by law to be made in accordance with a statutory form, it is now settled that the same rules of construction are to be applied to the terms of the statutory policy as to other forms of policies."[68]

The "Incontestable Clause"

The provision found in most life insurance policies (required in many states by statute) that declares such a policy to be incontestable after a certain period "is said to be in the nature of a conventional statute of limitations; but it is not subject to the rules governing such statutes. The numerous decisions construing the clause are not wholly harmonious but the following rules are accepted, in all or most jurisdictions: (a) The incontestable clause bars every defense not excepted expressly therein saving want of insurable interest. Even fraud in the procurement of the contract is barred, although there is much authority allowing such fraud to be shown when the policy is made incontestable from date. (b) But the insurer is not precluded from showing that a loss suffered was due to an excepted risk, not covered by the policy. (c) The contest required must be by court action, either by answer or plea to an action brought or by bill to cancel the policy. A renunciation of the contract is not sufficient. (d) In cases of reinstatement, difficulty arises as to the 'date of issue' from which the running of the incontestable period is to be computed. When the defense set up involves a condition of the original contract, the period is computed from the policy date. But when the defense arises out of the transaction resulting in reinstatement, the period fixed by the policy runs from the date of the reinstatement. (e) The death of the insured during the contestable period does not stop its running. The formal contest must nevertheless be made within the specified time; but where the policy is payable to insured's estate, the time elapsing between the death of the insured and the qualification of his executor or administrator is excluded. (f) The clause has no application to conditions operative after loss, such as that requiring proofs of loss."[69]

[68] Vance, §§ 179, 180, p. 689.

[69] Vance, § 231, pp. 818, 819.

CHAPTER 19

BUSINESS DEVICES

AGENCY

85. Agency is the relationship which results from the manifestation of consent by one person called the principal to another called the agent that the latter shall act on behalf of the former and subject to his control, and consent by the agent so to act.[1]

In general

An agent differs from a servant in that an agent may bring his employer or principal into legal relations with third persons, whereas a servant renders services for his employer or master which are not of such a nature as to create new legal relations between the master and third persons. Thus, the persons hired for and engaged in a business enterprise generally fall into two groups, one group being composed of those whose duties are primarily manual or mechanical, such as truckers and workmen engaged in production; and a second group the members of which have the authority to create new legal relations between the employer or principal and third persons. Any act which a person can do in his own right and which the law does not require specifically to be done personally, can be performed through an agent; but, of course, an agency contract or appointment which contemplates an illegal object, that is an act criminal, tortious, or opposed to public policy, is void.[2]

General and Special Agents

Agents are either "general" or "special," a general agent being one authorized to conduct a series of transactions involving a continuity of service, whereas a special agent is one authorized to conduct a single transaction or a series of transactions not involving continuity of service, the distinction between the two

[1] See Restatement of the Law of Agency, (hereinafter cited "Restatement") § 1, p. 7.

[2] See Tiffany on Agency, 2d Ed., (hereinafter cited "Tiffany"), §§ 65, 66, pp. 173, 175.

kinds of agents being one of degree.[3] Thus, the manager of a business is a general agent for the principal who employs him, whereas a person engaged only to deliver a deed, on specified terms, is a special agent.[4]

Disclosed, Partially Disclosed, and Undisclosed Principals

Principals, or those on whose behalf agents act, to the extent that the third persons involved have notice of the existence and identity of the principals, are either disclosed, partially disclosed, or undisclosed. Thus: "(1) If, at the time of a transaction conducted by the agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is disclosed. (2) If the other party has notice that the agent is or may be acting for a principal but has no notice of the principal's identity, the principal for whom the agent is acting is partially disclosed. (3) If the other party has no notice that the agent is acting for a principal, the principal is undisclosed." [5]

Capacity of Parties

As a rule, "capacity to enter into a contract of agency, or to act by means of an agent is coextensive with the capacity of the principal to contract;" [6] and, "the ordinary consequences of agency follow the appointment of an agent by a person of limited capacity, except that the appointment and transactions done thereunder are subject to defenses which the principal may have because of his lack of capacity. Thus, infants and persons lacking full capacity because of mental defects are affected by acts done on their account by a person whom they direct so to act, to the extent to which they have capacity to give consent and become parties to the transaction. Likewise, aside from statute, to the same extent that a married woman may be bound by her

[3] See Restatement, pp. 13, 14.

[4] The term "attorney" is sometimes used as a synonym of the term "agent," and the terms "attorney at law" and "attorney in fact" are commonly used, the former to denote "an advocate, counsel, or official agent employed in preparing, managing, and trying cases in the courts," whereas the term "attorney in fact" is used to denote one authorized by another to act in his place and stead, "either for some particular act, or for the transaction of business in general, not of a legal character. This authority is conferred by an instrument in writing, called a 'letter of attorney,' or more commonly a 'power of attorney.'" Black's Law Dictionary, 3d Ed., p. 167.

[5] Restatement, § 4, pp. 15, 16.

[6] Tiffany, § 67, p. 177.

consent to a delegable act, the act of an agent pursuant to her directions binds her." [7]

On the other hand, any person has capacity to act as agent on behalf of another, but as between principal and agent the validity of their contractual relation is determined by the capacity of the agent to contract. Thus, an infant, a married woman, or a person otherwise incompetent to bind himself by contract, may still have capacity to act as an agent and execute contracts on behalf of his principal which will bind the latter. However, an interest adverse to the interests of the principal may affect the capacity of a person to act as agent. For example, under the seventeenth section of the Statute of Frauds, a party to a contract of sale may not, as agent of the other party to the contract, affix the latter's signature to the memorandum or note required to take such a transaction out of the operation of the statute. In other cases, if the agent has an adverse or antagonistic interest the principal may repudiate the transaction or adopt it and claim an account of the profit made by the agent.

Delegation of Authority by Agent; Subagents

An agent may, as a rule, delegate his authority to a subagent unless such delegation is against public policy or his contract with the principal. Whether or not such a delegation would be contrary to the agency contract may be gathered from the expressions of the principal, the character of the business, usages, prior conduct of the parties, the necessity of meeting an emergency, or from the character of the acts committed to the agent. Of course if the agency contract contemplates the personal services of the agent he is generally precluded from delegating his authority to a subagent, but in ordinary cases permitting delegation, and where a delegation is properly made, "the subagent is, so far as relates to third persons, the agent of the principal, and the acts of the subagent are binding upon the principal; but whether, as between principal and subagent, the relation of principal and agent is created, so that the subagent is responsible to the principal, depends upon whether the agent has been authorized to employ the subagent on the principal's behalf—that is, to create privity of contract between them—or has been authorized simply to employ a subagent on his own responsibility." [8] On the other hand, when an unauthorized delegation has been made, the legal relations of the principal and third person cannot be af-

[7] Restatement, p. 62.

[8] Tiffany, § 83, p. 209.

fected by the subagent and the agent is responsible to the principal for the conduct of the subagent and to the subagent for his compensation.

Appointment of Agents; Formalities

In the absence of contrary statutes, authority for any lawful purpose, except the execution of an instrument under seal, may be conferred upon an agent by specialty, by writing, by word of mouth, or by conduct. However, the authority to execute an instrument under seal must be conferred by an instrument under seal except where: "(a) the instrument is executed in the principal's presence and by his direction; (b) the instrument is authorized by a corporation or partnership in accordance with the rules relating to the authorization of such instruments by such associations; or (c) a statute deprives seals of their efficacy." [9]

Rules Relating to the Scope of an Agent's Authority

Some of the more important general rules relating to the scope of an agent's authority are as follows: (1) Where the authority of an agent is conferred by a formal written instrument it is construed more strictly than when informally conferred, but in all cases the object of the parties is to be kept in view and the agent has apparent authority to do whatever is reasonably necessary to its effective execution in accordance with the established usages and customs of the particular business to which his employment relates. (2) Where the authority is conferred in such terms as to be capable of more than one construction, an act done by the agent in good faith which is warranted by one construction is deemed to have been authorized although that construction was not intended by the principal. (3) Every agent in the execution of expressed authority has implied authority to do whatever is reasonably necessary to its effective execution unless the principal has indicated a contrary intention. (4) Every agent in the execution of expressed authority has authority to act in accordance with the established usages and customs of the particular business which he is employed to transact, or of the particular agency in which he is employed, unless his principal has indicated a contrary intention.[10]

In general, a principal is liable upon a contract duly made by his agent with a third person: (1) When the agent acted within the scope of his actual authority. (2) When the contract has

[9] Restatement, § 28(a), pp. 77, 78.

[10] See Tiffany, §§ 11–15, pp. 25–36.

been ratified by the principal. (3) When the agent acted within the scope of his apparent authority, unless the third person had notice that the agent was exceeding his actual authority.

Ordinarily a disclosed principal is liable to a third person on a contract formulated by his agent: (a) if the principal told the agent to do the act; (b) if he told the third person that the agent had the authority to do the act; or (c) if he told the agent to tell the third person that the agent had the authority to do the act. And, as a rule, an undisclosed principal may sue or be sued upon a contract made on his behalf by his agent. On the other hand, an agent may become personally liable to the third party involved in the following general situations: (1) When he acts without authority or exceeds his authority. (2) When, although intending to bind his principal, he executes an instrument in such a way as to bind himself instead of his principal. (3) When he expressly pledges his own liability. (4) When he conceals his character as agent, or conceals the name of his principal, or renders his principal inaccessible. (5) When he has no responsible principal, either from want of legal existence or from want of legal responsibility. Where the agent has failed to bind his principal and has rendered himself liable on a contract, or when he has a beneficial interest in the contract, he may sue upon it.

Ratification

Ratification is defined as, "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." [11] And generally a person may ratify any previous unauthorized act done by another in his behalf which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done. However, an act cannot be ratified unless the actor intended to act for the ratifier, and the ratifier must have been in existence when the act was done and must have been competent to authorize the act when it was done and be still competent to authorize it at the time of ratification. As a rule, a ratification may be accomplished by express terms, or it may be implied by conduct. However, where formalities are requisite for the authorization of an act such an act can only be ratified by the same formalities. The ef-

[11] Restatement, § 82, p. 197.

fect of a ratification is to make the unauthorized act that of the principal the same as though authority to do the act had been previously given, except where the rights of third persons have intervened between the act and the ratification; and, except in cases of tort, it releases the agent from liability for loss or damage arising from the act. Generally, however, a principal cannot ratify the unauthorized act of an agent so as to acquire rights against the third person without the express or implied consent of the latter.

Duties of the Parties

The general duties of an agent to his principal are as follows: (1) To obey instructions. (2) To exercise skill, care, and diligence. (3) To act in good faith. (4) To account. Correlatively, the general duties of a principal to his agent are as follows: (a) To remunerate the agent for his services. (b) To reimburse the agent for expenses incurred in the execution of his authority. (c) To indemnify the agent against the consequences of acts performed in the execution of the agency.

Liability of Principal for Agent's Torts and Crimes

As a general rule, the principal is liable for all the torts of the agent committed in the regular course of his employment and within the scope of his authority; and for all such torts, not within the scope of his authority, which have been authorized by the principal. However, the agent is also liable for his torts and is not released by reason of the principal's liability. On the other hand, the principal is not usually liable for the crimes of the agent unless the principal has previously authorized such acts except: "(1) Where the law has imposed upon the principal the obligation to see that his subordinates abstain from designated acts; and (2) Where the law has imposed upon the principal the obligation to assist in enforcing prohibitive legislation." [12]

Termination

An agency relation may be terminated in one of three general ways: (1) naturally, by the expiration of the time or completion of the business for which it was created; (2) by the express withdrawal of either the principal or the agent; and, (3) by disability of the parties. However, the rights of the principal or agent to terminate their relation by withdrawal are subject to the following limitations: (a) An agency coupled with an interest

[12] Tiffany, § 44, p. 124.

is nonterminable except by natural expiration.[13] (b) Authority given for a valuable consideration to secure or effect some benefit to some third person or to the grantee thereof, independent of the agent's compensation, is nonterminable except by the death of the principal or by natural expiration. (c) When an agent is employed to engage in a course of action which, if left incomplete, will result in liability or detriment to the agent, the authority becomes irrevocable unless the principal protects the agent from such liability or detriment. (d) In other cases the power of a party to terminate an agency relation is subject to an action by the other for breach of contract if the termination constitutes such a breach. In addition to cases mentioned wherein agency contracts may be terminated by operation of law, as distinguished from acts of the parties, such contracts may be ended by reason of the death, insanity, marriage, or bankruptcy of either the principal or the agent, or by war between their countries, to the extent that such disability has rendered either party less able to effectually contract.[14]

PARTNERSHIPS

86. A partnership is an association of two or more persons to carry on as co-owners a business for profit.[15]

In general

The modern law of partnerships is the result of a fusion of principles which had their origin in the civil law, the law merchant, equity, and the common law. "In England and in the United States the eighteenth century was the period of considera-

[13] An agency coupled with an interest, or power given as security, is defined in the Restatement, § 138, p. 350, as follows: "A power given as security is a power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title, either legal or equitable, such power being given when the duty or title is created or given for consideration." For example, "P, stating that he wishes to make A a gift of 100 shares in the X corporation, writes to A that he appoints A his attorney to transfer to himself the shares upon the books of the company; he also encloses the certificates which are received by A. A has a power given as security." Id, p. 354.

[14] See Tiffany, c. 21, pp. 218–250.

[15] Uniform Partnership Act (U.P.A.), approved by the National Conference of Commissioners on Uniform States Laws, in 1914, § 6(1). The various jurisdictions in which this act has been adopted are listed in the appendix.

ble use of the partnership form of business association for all kinds of enterprises, and of the development of the common law of partnership. The result was an amalgamation of certain well-established common law institutions, such as joint property and joint obligations, with the more flexible rules of the law merchant, as recognized and applied in courts of equity. So much confusion and uncertainty existed, especially with respect to the incidents of ownership of partnership property, that demands for statutory restatement arose." [16] The result of these demands, in England, was the Partnership Act of 1890; [17] in the United States, the result was the Uniform Partnership Act. The latter act is, of course, the authoritative statement of the law in those states which have adopted it, but it also is, for the most part, in accord with the common law prevailing in those states which have not adopted it.

Formation; Capacity of Parties

A partnership is a form of voluntary association intentionally entered into by the associates. It is a personal relation in which the elements of delectus personae exist. That is, no one can become a member of a partnership association without the consent of all the other parties. However, such an association may be informally created and its existence proved by manifestations of the parties, but it is customary to embody the terms of association in a written document termed articles of partnership. And, of course, some of the incidental terms of a partnership agreement may in their operation be subject to the provisions of the Statute of Frauds.

Of course, in order that there be a binding partnership relation, the persons thereof must have legal capacity to enter such an association. Thus, an infant's contract of partnership is voidable by him, and the contract of an insane person to be a partner is voidable. For reasons of public policy no partnership relation can be created or continue between residents of countries which are at war with each other. At common law, a married woman is without capacity to become a partner but modern legislation has in most jurisdictions conferred on a married woman capacity to be a partner, although in some jurisdictions she cannot be in partnership with her husband. And, "in the absence of specific authority conferred by corporation laws or corporate articles, a corporation lacks capacity to become a partner." [18]

16 Crane on Partnership, (hereinafter cited "Crane"), pp. 6, 7.

17 53–54 Vict., c. 39.

18 Crane, § 9, p. 34.

Rules for Determining Whether a Partnership Exists

Under the U.P.A.,[19] in determining whether a partnership exists, the following rules apply: (1) Except in the case of a partner by estoppel, persons who are not partners as to each other are not partners as to third persons. (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property. (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived. (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment: (a) As a debt by installments or otherwise, (b) As wages of an employee or rent to a landlord, (c) As an annuity to a widow or representative of a deceased partner, (d) As interest on a loan, though the amount of payments vary with the profits of the business, (e) As the consideration for the sale of a good-will of a business or other property by installments or otherwise.

Partnership Property

In regard to the property or a partnership the U.P.A.[20] provides: "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property;" and, "unless the contrary intention appears, property acquired with partnership funds is partnership property."

Relations of Partners to Third Persons

Concerning the relations of partners to persons dealing with a partnership the U.P.A.[21] provides: "(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact

19 Section 7.

20 Section 8.

21 Section 9.

that he has no such authority. (2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners. (3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to: (a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership, (b) Dispose of the good-will of the business, (c) Do any other act which would make it impossible to carry on the ordinary business of a partnership, (d) Confess a judgment, (e) Submit a partnership claim or liability to arbitration or reference. (4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction."

Relations of Partners to One Another

The rights and duties of partners in relation to their partnership, subject to any agreement between them, are to be determined under the U.P.A.[22] by the following rules: "(a) Each partner shall be paid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits. (b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property. (c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance. (d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made. (e) All partners have equal rights in the management and conduct of the partnership business. (f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs. (g) No person can become a member of a partnership without the consent of all the partners. (h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act

[22] Section 18.

in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."

Liability of Partners

In regard to the liability of partners, the U.P.A.[23] provides: "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act;" and, "The partnership is bound to make good the loss: (a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and (b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership." All partners are liable jointly and severally for everything chargeable to the partnership under these two provisions. For all other debts and obligations of the partnership all partners are liable jointly, but "any partner may enter into a separate obligation to perform a partnership contract."[24]

Dissolution

The dissolution of a partnership "is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."[25] The partnership is not terminated on dissolution but continues until the winding up of partnership affairs is completed.[26] Under section 31 of the Uniform Partnership Act, dissolution is caused: "(1) Without violation of the agreement between the partners, (a) By the termination of the definite term or particular undertaking specified in the agreement, (b) By the express will of any partner when no definite term or particular undertaking is specified, (c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking, (d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement be-

[23] Sections 13, 14.

[24] U.P.A. § 15(b).

[25] U.P.A. § 29.

[26] See U.P.A. § 30.

tween the partners; (2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time; (3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership; (4) By the death of any partner; (5) By the bankruptcy of any partner or the partnership; (6) By decree of court under section 32." And the latter section provides: "(1) On application by or for a partner the court shall decree a dissolution whenever; (a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind, (b) A partner becomes in any other way incapable of performing his part of the partnership contract, (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business, (d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him, (e) The business of the partnership can only be carried on at a loss, (f) Other circumstances render a dissolution equitable. A court may also decree a dissolution on the proper application of a purchaser of a partner's interest, in circumstances prescribed by the Act.[27]

Distribution of Assets

The process of winding up a partnership after dissolution consists in reducing the property to cash and distributing the proceeds. The property of the partnership must be liquidated and distributed, and property which may be made available for distribution includes, in addition to the partnership property, contributions which may be collected from the partners so far as necessary for the payment of partnership obligations to creditors and partners. "The distribution of partnership assets in the course of winding up consists, first of all, in the payment of creditors other than partners. Then come the claims of partners other than those for repayment of capital contributions or profits, such as claims for advancements made by partners. The presumption is that interest is payable on such advancements. After this, partners are entitled to return of their respective capital contributions. Should there not be sufficient partnership property to repay capital contributions, the loss is to be shared by

[27] See §§ 32(2), 27, and 28.

the solvent partners, like other losses, in the proportions in which they would share profits. Finally, any remaining balance of partnership property is distributable as profits."[28] However, these rules as to distribution are subject to variation by agreement of the partners, either in their original partnership agreement or in a dissolution agreement.

Some Particular Kinds of Partners

Partners are sometimes referred to with qualifying terms of which some of the most important are as follows: (1) "Partners by estoppel" or "ostensible partners." Such "partners" are not actually partners, but are persons who represent themselves to be partners, or consent to their being so represented by those who carry on a business, with the result that as to third persons who are led to act upon the representation, they are subject to liability as though they were actual partners.[29] (2) "Dormant partners." Such a partner is one whose name is not used, who is so far inactive that his association with the partnership is generally unknown, but he is nevertheless a partner and subject to liability for all partnership obligations incurred while he is a member of the partnership. (3) "Incoming partners," or those

[28] Crane, p. 392. See also, U.P.A. § 40.

[29] Section 16 of the U.P.A., relating to partners by estoppel, provides: "(1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made. (a) When a partnership liability results, he is liable as though he were an actual member of the partnership. (b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately. (2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation."

who are brought into a going business as new partners. They are not personally liable on old obligations, unless they actually assume them, but their shares in the partnership property are liable under the Uniform Partnership Act.[30] (4) "Retiring partners," or those who, after a dissolution, cease to be partners in the business and which is carried on by others. They remain liable for partnership obligations incurred while they were partners, but are not liable for new obligations, unless they have failed to give necessary notice and so are held liable as partners on principles of estoppel. (5) "Continuing partners," or those who continue a business after a partnership has been dissolved and some of the former associates have ceased to be partners by reason of death or retirement. (6) "Surviving Partners," or those who remain after dissolution by death. They succeed to the ownership of the partnership property and are charged with the duty of liquidation, unless, by agreement, the business is to be continued. (7) "Liquidating" or "winding-up" partners, or those who are charged by agreement after dissolution, or by law, with the duty of liquidating the affairs of the partnership. (8) "Managing partners," or those to whom the other partners have delegated the responsibilities of management. This term is frequently used in England, and occasionally in the United States.[31]

Statutory Limited Partnerships

A limited partnership is one which is formed by compliance with certain statutory requirements, and unity in such requirements is now attainable by reason of the Uniform Limited Partnership Act, approved by the National Conference of Commissioners on Uniform States Laws, in 1916. Such a partnership consists of general partners, or those who manage the business and have the same liability as the members of an ordinary partnership; and limited or special partners, or those who share in the profits of the association but do not take losses beyond their capital investments and take no part in management. "The creation of a limited partnership is not a mere voluntary informal agreement, as in the case of a general partnership, but it is a formal proceeding which must follow the requirements of the statute. The associates must sign and file a certificate which, according to the Uniform Limited Partnership Act, [§ 2], must set forth the partnership name, charter and location of the business, names and residences of general and special partners, terms for which the business is to be carried on, amount and character of contributions by special partners, shares of profits to be received by special partners, methods, if any, for change of personnel, and continuance of business after retirement of a general partner. The general partners conduct the business and are personally liable to creditors. The special or limited partners do not participate in management and are not personally liable to creditors."[32] In other respects, the limited partnership is, for the most part, similar to a general partnership in respect to the rights of creditors and the relations of associates as between themselves.

[30] See sections 17, 41.

[31] See Crane, pp. 78–79.

When a limited partnership is wound up and its assets distributed, "after payment of the claims of third persons as creditors, the claims of limited partners for profits, and return of capital contributions, rate ahead of similar claims of general partners. [U.L.P.A., § 23] For advancements other than capital contributions, the limited partner rates as a creditor. * * * If return is made to a limited partner of his contribution before creditors are paid, he is under a liability to restore such payments, with interest, so far as necessary to meet the claims of creditors."[33]

Joint-stock Companies

A joint-stock company is a partnership with transferable shares and concentration of management. Such companies may exist at common law but frequently they have powers of a corporate nature conferred by statute. Thus, "an association which is unincorporated, but which carries on a business for profit with the corporate attributes of transferability of shares and concentration of management in chosen representatives, is commonly

[32] Crane, pp. 81, 82.

"In a few states, when incorporation was difficult, or general incorporation laws were lacking, legislative provision was made for limited partnership associations. Laws permitting this form of association were passed in Pennsylvania in 1874, [P.L. 271, see now 59 P.S. § 341], authorizing the formation of 'partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances.' Somewhat similar laws were passed in several other states, but little use appears to have been made of them save in Pennsylvania and Michigan. While such associations possessed the corporate attributes of concentration of management, transferability of shares, right to sue and be sued, and to own property in the common name, and limited liability, they are not corporations. They retain the delectus personae feature of partnership, and they do not have the right as do corporations to claim citizenship for the purpose of federal jurisdiction in the state where organized." Crane, pp. 84, 85.

[33] Crane, p. 393.

designated a joint-stock company. Tranferability of shares is an attribute which the associates assume by agreement. As distinguished from the ordinary partnership, the associates relinquish the usual incident of delectus personae. Consequently they do not assume the risk of being subject to representation by anyone who happens to be a member, but agree upon concentration of management in elected officers. Persons dealing with the association with knowledge of its character acquire rights against it only through the acts of its officers. Members or shareholders in a joint-stock company, having the power of control of their representatives, are co-owners of the business, and are personally liable for its obligations except as to those who agree in contracting with it that they shall have recourse only against the joint property. This personal liability of a member for obligations incurred during his membership is not terminated by his death or by the transfer of his shares. In some states legislation exists permitting joint-stock companies to hold real estate and to sue and be sued in a common name or in the name of an officer."[34]

Business Trusts

A business trust, or Massachusetts trust, is a form of association in which the associates attempt to secure corporate advantages without incorporation through the use of the device of the common law trust; but the business trust differs from the common law trust in that it is created not by a donor or settlor, but by the beneficiaries. The business trust differs from the ordinary partnership in having transferable shares and concentration of management, but it sometimes is similar to a joint-stock company in that the power of ultimate control is vested in the beneficiaries and they are subject to personal liability to third persons. The associates in a business trust are of two kinds, beneficiaries and trustees. "The beneficiaries contribute the capital necessary for an enterprise in return for transferable shares of beneficial interest, entitling the holders to share in profits. The trustees are the owners of the property and managers of the enterprise. In some states the association is regarded as a partnership. In the majority of states the association is a partnership or trust, according to whether the beneficiaries under the articles of association, possess such powers of control as to occupy the position of principals, or whether all powers of management are vested in the trustees. In many respects the business trust is treated by legislation as a corporation, for such purposes as registration, taxation and litigation."[35]

[34] Crane, pp. 117–119.

PRIVATE CORPORATIONS

87. A corporation is an artificial person or being, endowed by law with the capacity of perpetual succession; consisting either of a single individual, (termed a "corporation sole,") or of a collection of several individuals, (which is termed a "corporation aggregate").[36]

Classes

Corporations may be classified according to their objects as (a) ecclesiastical, or those created to carry out some religious object; (b) eleemosynary, or those created to carry out some charitable object; (c) civil, or those other than religious and eleemosynary corporations. The latter, civil corporations, subdivide into (1) public corporations, or those created for the purpose of government, such as cities and villages; (2) private corporations, or those created for private purposes and which include industrial and commercial corporations as well as religious and eleemosynary corporations; and, (3) quasi public corporations, or those engaged in private businesses affected with a public interest, such as privately owned public utility companies.[37]

Characteristics

The characteristics which distinguish a corporation from unincorporated associations, particularly in early law, are: (a) The concentration of the exclusive power of management in a board of directors. (b) Transferability of shares, making perpetual succession a possibility. (c) Power to take, hold, and convey property in the company name. (d) Power to sue and be sued in the company name. And, (e) limited liability of shareholders

[35] Crane, § 33, p. 104.

[36] Black's Law Dictionary, 3d Ed., p. 438.

[37] Corporations, according to the state in which they are incorporated, are either "domestic" or "foreign." "Within a given state, a 'domestic corporation' is one formed under the laws of that state; a 'foreign corporation' is one formed under the laws of some other state or some other nation or political subdivision thereof." Stevens on Corporations, § 202, p. 814. In the Uniform Foreign Corporation Act, § 1, the terms are defined as follows: "domestic corporation" shall mean a corporation formed under the laws of this state; "foreign corporation" shall mean a corporation not formed under the laws of this state.

ers. As Chief Justice Marshall wrote,[38] "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being." It is the capacity to act as an artificial person, as an entity separate from the individuals who hold its stock, and to incur debts and other liabilities without making its shareholders personally liable that generally distinguishes a corporation from other business associations and devices. However, the theory that a corporation is an entity separate from its shareholders will be disregarded where the attributes of incorporation are being used to defeat public convenience, justify wrong, protect fraud, or defend crime.

Formation

The formation of a corporation usually involves the following steps: (a) conception of the project by the promoter; (b) the working out of the details thereof by the promoter, including the financing and organization; and, (c) the sale of securities of and interests in the enterprise to the public. The corporation itself, that is the separate entity, is created when the government grants a charter of incorporation to the promoter and his associates or the incorporators. "In England, charters were first granted by the king, and there and in the British Dominions it is still possible to have 'common-law' corporations, i. e., corporations formed under executive authority, as well as legislatively authorized corporations. In the United States, Legislatures alone authorize incorporation, usually by general statutes, but, in particular circumstances, by special acts."[39] These general in-

[38] Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636, 4 L. Ed. 629, 1819.

[39] Stevens on Corporations, (hereinafter cited "Stevens"), § 21, p. 92.

corporation laws usually require, "(a) Articles of incorporation to be prepared, signed, acknowledged, and filed for record in designated public offices. (b) Share subscriptions obtained and at least the minimum amount of capital paid in. (c) An organization meeting of shareholders for the election of directors and officers and the adoption of by-laws."[40] The articles of incorporation are ordinarily required to set forth the names of the incorporators and their residences, the name by which the corporation will be known, the location and post office address of its registered office or principal place of business in the state, the objects and purposes of the corporation, the duration of corporateness, the number and qualifications of directors, and usually the names of those who are to act as directors for the first year or until an election is had as prescribed by the articles; the total authorized number of par-value shares and the par value of each share, the authorized number of shares without par value, if any, a description of the classes of shares, if the shares are to be classified, with a statement of the number of the shares in each class and the relative rights, voting power, preferences, and restrictions granted to or imposed upon the shares of each class; and it may also be required that the articles indicate the amount of paid-in capital with which the corporation will begin business and that this shall not be less than a specified amount. The amounts paid in by the subscribers to its shares are used to get the corporation under way, and this fund, with whatever amounts that may be received in the future for its authorized but unissued shares, and whatever amounts it may realize as profits from its business and investments, constitutes the capital of the corporation and the property its creditors must ordinarily look to for the satisfaction of their claims.

De Jure and De Facto Organizations

If the conditions and formalities prescribed by statute are properly complied with, the company which results is described as a de jure corporation and its organization cannot be successfully attacked, even in a direct proceeding by the state. However, if the incorporation of a company is so defective that it is subject to successful attack in a direct proceeding by the state,

[40] Stevens, § 22, p. 98. Uniformity in such general incorporation laws is now attainable by reason of the Uniform Business Corporation Act, approved by the National Conference of Commissioners on Uniform State Laws, in 1928. The various jurisdictions in which this act has been adopted are listed in the appendix.

but is not open to collateral attack in private litigation, or even in suits to which the state is a party, the company is described as a de facto corporation; but "to say that there is a de facto corporation is to say merely that, in the particular litigation, the application of the de facto doctrine calls for a denial of collateral attack upon the corporate personality of the associates even though they have failed to perfect incorporation. * * * The de facto doctrine effects a compromise between conflicting public interests—the one opposed to an unauthorized assumption of corporateness; the other in favor of doing justice to the parties and of assuring security in business dealings with corporations. The first interest is guarded by the power of the state to intervene in a direct proceeding whenever an assumption of corporateness is based on defective incorporation. The first interest is further protected by permitting collateral attack whenever the offensive assumption is sufficiently grievous. But the second interest, which is promoted by a denial of collateral attack, predominates when the unauthorized assumption is coupled with certain mitigating circumstances which are known as the elements of the de facto doctrine."[41] These elements of the de facto doctrine, often referred to as the requisites of a de facto corporation, are: (a) The existence of a statute under which the particular type of corporation might have been validly incorporated. (b) A real, though insufficient, attempt to comply with such statute. (c) A user, or exercise of corporate privileges.

Corporate authority

The charter of a corporation granted by the state is regarded as in the nature of a triplex contract; that is as being a contract between the state and the corporation, a contract between the corporation and its shareholders, and, as a contract between the shareholders inter sese. Thus, the authority of a corporation, (that is the extent to which acts or transactions are within the scope of the corporate purposes and activities as agreed upon by the shareholders), is ascertained by reference to: "(a) The charter or articles of incorporation; (b) The special or general act under which it is formed; and (c) Any other statutes applicable to such corporation."[42] The authority of a corporation includes: (1) The general authority customarily incident to and characteristic of all corporations; that is the authority to operate as an entity separate from its shareholders; (2) Its express authority or that which is dependent upon and limited by

[41] Stevens, pp. 121, 124, 125.

[42] Stevens, § 46, p. 199.

its purposes or business as specified in its charter; and, (3) Implied authority to do all such things as are reasonably incident to its specific purposes and business.

Ultra Vires Transactions

A transaction which is beyond the scope of the corporate purposes and activities as agreed upon by the shareholders is termed "ultra vires," and may subject the corporation to a proceeding by the state for the forfeiture of its charter or to a suit by a shareholder for an injunction restraining the ultra vires activity. The decisions of cases involving questions arising from ultra vires contracts are in conflict, and the rights of the parties to such a contract may vary according to whether it is entirely executory, partially performed by one party only, or executed by both of the parties. However, the following general principles are deducible: (1) An ultra vires conveyance of property by or to a corporation passes title. (2) An ultra vires contract fully performed on both sides will stand as a foundation of rights acquired under it. (3) When an ultra vires contract is wholly executory on both sides, either the corporation or the other party may assert ultra vires as a complete defense to any action or suit brought upon such contract. (4) As to ultra vires contracts which have been partially performed, the States divide into two groups: (a) In a minority of state courts, an ultra vires agreement is regarded as a nullity which cannot be the foundation of an action on the contract. But in these jurisdictions an action can be maintained quasi ex contractu or for an accounting to recover the value of benefits received by defendant as a result of the partial performance of the ultra vires agreement. (b) In the majority of state courts, an ultra vires contract is not regarded as void, and the defense of ultra vires, whether interposed by or against the corporation, is not permitted to prevail when the party bringing the action upon the contract has performed it on his side.

Liability of Corporations for Torts and Crimes

A corporation is responsible for the torts of its agents committed in the course of their employment to the same extent that an unincorporated individual or association would be, and this is true even as to torts involving a mental element such as malicious prosecution, fraud, slander, and libel. Further, when a corporation assumes to engage in an ultra vires activity responsibility will attach to the corporation for torts committed by its agents while acting within their authority in the course of such activity.

In regard to corporate responsibility for crimes, the early rule was that a corporation, being incapable of forming a criminal intent could not be held liable for the criminal acts of its servants, but this attitude is now quite generally relaxed. Thus, Learned Hand has written,[43] "That the criminal liability of a corporation is to be determined by the kinship of the act to the powers of the officials who commit it is true enough, but neither the doctrine of ultra vires, nor the difficulty of imputing intent or motive, should be regarded any longer to determine the result." Since the relaxation of the old rule corporations have been held liable for such crimes as libel, fraud, conspiracy, contempt, manslaughter, and maintenance of a nuisance. The penalty imposed upon a corporation responsible for crime may be a fine or the forfeiture of its charter; but obviously a corporation cannot be imprisoned. Consequently, to prevent the wholesale escape of corporations from the effect of criminal statutes which have specified only imprisonment as the penalty some states have adopted a general provision that: "In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars."[44]

Shareholders

Membership in a corporation is acquired by contract with the incorporated body of shareholders and ordinarily results from subscribing for shares before or after incorporation or from accepting a transfer of the share interest of one who is a shareholder; the "shares" of a corporation being the units into which the shareholders' rights to participate in the control of the corporation, in the surplus or profits, and in the distribution of assets on dissolution are divided. Of course the rights of shareholders vary according to the terms of their contracts and the class of shares which they hold; but, in general, the principal rights of a shareholder are: (a) To participate and vote in shareholders' meetings; (b) To share in the profits of the corporate business through dividends as declared by the board of directors; and, (c) To share in the assets upon the corporation's dissolution, after the creditors have been paid.

The liability of a shareholder to creditors of the corporation is ordinarily limited, such limited liability being one of the most

[43] United States v. Nearing, D.C., 252 F. 223, 1918.

[44] See N. Y. Penal Law, § 1932.

important characteristics of corporateness; the term "limited liability" meaning that shareholders are liable to creditors or to the corporation for the benefit of its creditors only to the extent that the shares held by them have not been fully paid for. "However, in some instances general unlimited liability is possible; unlimited liability to employees is frequently found established by statutes; and double liability of the shareholders of banking corporations is very generally the rule."[45]

The instrument which evidences the interest or shares of a shareholder in the corporation is termed the "stock certificate," and in the absence of statutory, charter, or by-law restrictions shares may be transferred by delivery of the certificate with a written assignment which may be in blank, but it is ordinarily provided that shares are transferable only on the books of the corporation.[46] However, under the Uniform Stock Transfer Act as approved by the Commissioners on Uniform State Laws in 1909, which act was intended to give share certificates a negotiable quality, the delivery of a certificate with an assignment transfers title to the shares and registry on the corporate books is not necessary to complete the transfer.

Directors and Officers

The actual control and operation of a corporation is vested in a board of directors. However, unless required by statute, articles, or by-laws a person needs no particular qualifications to become a director or officer of a corporation. Nevertheless, it has been usual that directors be required to be shareholders, but this is not a necessary requirement and under some modern statutes directors need not be shareholders unless the articles so require. "Boards of directors do not exist because corporations are nonphysical legal entities, incapable of acting except through this human agency prescribed by law, nor because the statutory requirement [generally found] of boards of directors is dictated by the interest of the state in the matter. Boards of directors exist because of the statutory recognition that the efficient and economical management of corporate business is promoted by centralization of management in a small group."[47] The authority of the board over the ordinary business of a corporation is normally exclusive and free from interference or control by a ma-

[45] Stevens, § 170, p. 685.

[46] Such provisions, however, are usually held to be merely for the protection of the corporation and do not necessarily preclude an unrecorded transfer from passing title to the shares involved.

[47] Stevens, § 138, p. 544.

jority of the shareholders because all of the shareholders have agreed to management by a duly elected board, not by a majority of the shareholders.

Directors are the representatives of the shareholders and consequently the extent to which the board may delegate its functions depends upon the extent to which the shareholders have conferred delegable duties upon the board or have assented to or ratified such delegation. Within these limits functions may be delegated by the board to an executive committee, single directors, or to officers or persons not directors.

Where the management of corporate affairs is vested in a board of directors, normally they must conduct the business as a board and not otherwise. Action by one, or separate action of all taken independently, is not "board" action which will bind the corporation. Thus, the authority of particular officers, when acting individually, and whether or not they are members of the board, to bind the corporation, depends upon the statute, the corporate articles and by-laws, general custom, and the practice followed in the particular corporation. "Primarily, an officer has not, by virtue of his office alone, authority to transact corporate business, but he may be given, either expressly or by implication, authority as to a particular transaction, or general authority to transact the usual corporate business. * * * Persons dealing with one who assumes to act for a corporation are not bound at their peril to ascertain that the latter has actual authority; they may rely upon the apparent authority of the latter, but such persons are obligated to use reasonable precautions in inquiring as to his authority. When the corporate representative acts within the apparent scope of his authority, he may bind the corporation, whether the particular transaction be intra vires or ultra vires."[48]

In regard to the standard of care and skill required of directors, "the nearest approximation to a general rule is that directors are required to discharge the duties of their office in good faith and with that diligent care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. The standard is relative, depending upon: (a) The character of the corporation and the nature of its business. (b) The understanding between the shareholders or the administrative practices approved by them. (c) The general usage in that type of corporate business. (d) Whether the directors serve

[48] Stevens, §§ 159, 160, p. 640.

gratuitously, dividing their time with the conduct of other businesses, or are paid for devoting their whole time to this corporate business. (e) Whether a particular director is president or managing director or a member of the executive committee."[49]

Corporate Securities; Preferred Shares and Bonds

Preferred shares are those which entitle the holders to some priority as to dividends or principal or both over some other class or classes of shares, depending upon the terms of the contracts thereof; and, when preferred stock is "cumulative" dividends which for any reason are not paid, are not lost, but accumulate so that whenever a fund is available for dividends, no dividends may be paid therefrom to the holders of junior shares until the current and all accumulated dividends have been paid to the holders of the cumulative preferred shares. The holders of "noncumulative" shares, on the other hand, "are not entitled to back dividends for years in which the corporation had no fund from which dividends could be paid. In some jurisdictions, however, it has been held with respect to noncumulative shares that dividends do accumulate for those years in which the corporation had a fund available for dividends but none was declared. Other courts, including the Supreme Court, have held that noncumulative means that the shareholder is entitled to a dividend only if declared, and, if profits available for dividends are justifiably applied by the directors to capital improvements and nó dividend is declared within the year, the claim for that year is gone and cannot be asserted later."[50] However, whether shares are common or preferred, the interest which the holder thereof has in the corporation is proprietary in nature; he is not a creditor.

The obligations which corporations ordinarily issue for the purpose of obtaining necessary loans may generally be classified as either income, debenture, or convertible bonds. These have been defined as follows: "An income bond is one the principal of which may or may not be secured by a mortgage, but the interest is payable only out of net profits, and may be cumulative or noncumulative or may be of a fixed amount or in proportion to earnings. A debenture is an unsecured obligation, but may contain a covenant that no mortgage shall be put upon the corporate property unless the debentures are included in the debts secured by that mortgage. A convertible bond gives the holder the privilege of becoming a shareholder by exchanging his bond for shares."[51]

[49] Stevens, § 146, p. 588.
[50] Stevens, § 106, pp. 407, 408.
[51] Stevens, § 92, p. 366.

Generally, the creditors of a corporation have the same rights and remedies against a corporation and its property as the creditors of an individual have against him and his property.

Dissolution

When a corporation has been dissolved, those who were its members cannot claim the benefits of corporate entity in connection with business subsequently transacted, but they remain entitled to the benefits and subject to the incidents of that theory with regard to predissolution transactions and remain capable of suing and being sued as a corporate entity with respect to such transactions. The assets of a corporation, upon its dissolution, are generally distributed: First, to its creditors, according to their priorities; and, Second, to its shareholders, in proportion to the number of shares each holds and according to such preferences as the different classes, if any, may be entitled to upon liquidation.

CHAPTER 20

TORTS

IN GENERAL

88. A tort is an actionable civil wrong which is not, exclusively, a breach of contract.

The word "tort" is French, is derived from the Latin word "torquere," and means "wrong." The same act may constitute both a tort and a crime, these two consequences or results being different aspects of it. Thus, in the Anglo-American legal system, as a crime an act subjects the actor to a proceeding by the state and punishment by fine or imprisonment; as a tort it subjects the actor to a civil action by the person injured, the remedy usually being a judgment which requires the defendant to pay the plaintiff a sum of money for the injury the latter has suffered. Neither proceeding is a bar to the other. However, not every wrongful or unlawful act is both a tort and a crime although most of them are.

Tort law is a branch of private law and is substantive to the extent that it recognizes human interests, creates primary rights in rem and defines conduct violative of such rights. It differs from the law of contracts in that the primary rights which it creates are generally in rem and the rights which it protects ordinarily exist by reason of law alone, independently of agreements between persons.

Definitions

The following definitions from the Restatement of the Law of Torts [1] (hereinafter cited "Restatement") are requisite for an understanding of the discussion thereafter: (1) The word "interest" is used to denote the object of any human desire. (2) The word "act" is used to denote an external manifestation of

[1] See vol. 1, §§ 1–12, pp. 2–22. (The definitions of the various torts and the rules of law applicable thereto, which are set forth in the text and for which the Restatement is cited, are also, for the most part, in the words of that work, but because of changes in arrangement and expedient modifications of context, quotation marks have not always been used.)

the actor's will and does not include any of its results, even the most direct, immediate and intended. (3) The word "actor" is used to designate either the person whose conduct is in question as subjecting him to liability toward another, or as precluding him from recovering against another whose tortious conduct is a legal cause of the actor's injury. (4) The word "duty" is used to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he may become liable to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause. (5) The words "subject to liability" are used to denote the fact that the actor's conduct is such as to make him liable for another's injury, if (a) the actor's conduct is a legal cause thereof, and (b) the other has not, by his own misconduct, so contributed to his injury as to disable him from bringing an action. (6) The word "tortious" is used to denote the fact that conduct whether of act or omission is of such a character as to subject the actor to liability under the principles of the law of torts. [Such conduct is of three types: (a) intentional; (b) negligent; (c) ultrahazardous.][2] (7) The word "injury" is used to denote the invasion of any legally protected interest of another. (8) The word "accidental" is used to denote the fact that the harm which is so described is not caused by any tortious act of the one whose conduct is in question. (9) The words "legal cause" are used to denote the fact that the manner in which the actor's tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law regards it just to hold the actor responsible for such harm.[3] (10) The word "privilege" is used to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances, does not subject him thereto.[4] (11) The words "reasonably believes" are used to denote

[2] As used to describe tortious conduct, the word "intentional" denotes conduct which is deliberate or volitional, an act done with knowledge on the part of the actor that an injury to another is substantially certain to result. "Negligent" conduct, on the other hand, is conduct which is not "intended," but which creates liability because it involves a risk, but not a certainty, of injury to another. The third type, "ultrahazardous" conduct, is conduct which is neither "intentional" nor "negligent," but which imposes liability upon the actor for injuries of others caused by such conduct because of its inherently dangerous character. For example, the storing of dynamite.

[3] Concerning the law on this subject of torts, see Green, "Rationale of Proximate Cause."

[4] "A privilege may be based upon (a) the consent of the other affected by the actor's conduct, or (b) irrespective of the other's consent, (i) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise, or (ii) the fact that the actor is performing a function for the proper performance of which freedom of action is essential." 1 Restatement, § 10(2), p. 19.

the fact that the actor believes that a given fact or combination of facts exist and that the circumstances which he knows, or should know, are such as to cause a reasonable man so to believe. (12) The words "reason to know" are used to denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists or that such person would govern his conduct upon the assumption that such fact exists. (13) The words "should know" are used to denote the fact that a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another or would govern his conduct upon the assumption that such fact exists.

In the light of these definitions it may generally be said that when the "tortious conduct" of an "actor" is the "legal cause" of an "injury," he has committed a tort and is "subject to liability" to the person whose "interest" has been so infringed, in the absence of a "privilege," or disabling misconduct on the part of the latter. The torts which most commonly occur are defined and discussed in the following paragraphs.

Battery

An act which directly or indirectly is the legal cause of a harmful contact with another's person constitutes a battery and makes the actor liable to the other if (a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and (b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and (c) the contact is not otherwise privileged. Further, an act which directly or indirectly is a legal cause of a contact with another's person or with anything so closely attached thereto that it is customarily regarded as a part thereof and which is offensive to a reasonable sense of personal dignity, although involving no bodily harm, also constitutes a battery and makes the actor liable to the other if (a) the act is done with the intention of inflicting a harmful or offensive contact upon the other or a third person or of put-

ting the other or a third person in apprehension thereof, and (b) the contact is not consented to by the other, and (c) the contact is not otherwise privileged.[5]

Assault

An act other than the mere speaking of words which directly or indirectly is a legal cause of putting another in apprehension of an immediate and harmful or offensive contact constitutes an assault and makes the actor liable to the other for the apprehension so caused if (a) the actor intends to inflict a harmful or offensive contact upon the other or a third person or to put the other or a third person in apprehension thereof, and (b) the act is not consented to by the other, and (c) the act is not otherwise privileged.[6] Thus, an assault is something more than the mere speaking of words but something less than an actual physical contact or battery, which is why an assault is sometimes described as an "inchoate battery."

False Imprisonment

An act which directly or indirectly is a legal cause of a confinement of another within boundaries fixed by the actor for any time, no matter how short in duration, constitutes the tort of false imprisonment and makes the actor liable to the other irrespective of whether harm is caused to any legally protected interest of the other if (a) the act is intended so to confine the other or a third person, and (b) the other is conscious of the confinement, and (c) the confinement is not consented to by the other, and (d) the confinement is not otherwise privileged.[7]

Trespass to Land

One who intentionally and without a consensual or other privilege (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or (b) remains thereon, or (c) permits to remain thereon a thing which the actor or his predecessor in legal interest brought thereon, is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests. A trespass to land may be committed on, beneath, or above the surface of the earth.[8]

[5] 1 Restatement, §§ 13, 18, pp. 29, 38.

[6] 1 Restatement, § 21, pp. 47, 48.

[7] 1 Restatement, § 35, p. 66.

[8] See 1 Restatement, §§ 158–161, pp. 359–379.

Trespass to Chattels

An actionable trespass to a chattel may be either non-dispossessory or dispossessory. The former, a non-dispossessory trespass, may be committed either by intentionally using or otherwise intermeddling with a chattel in the possession of another or by continuing to use or intermeddle therewith after a privilege to do so has been terminated.[9] A dispossessory trespass, on the other hand, may be committed by (a) taking a chattel from the possession of another without the other's consent, or (b) obtaining possession of a chattel from another by fraud, or (c) intentionally barring the possessor's access to a chattel, or (d) intentionally destroying a chattel while it is in another's possession.[10] One who intentionally dispossesses another of a chattel without his consent or other privilege so to do, and in the absence of mitigating circumstances, is liable to the other either as a trespasser for the damage done, or as a converter for the value of the chattel.[11]

Conversion

A conversion may be committed by (a) intentionally dispossessing another of a chattel, (b) intentionally destroying or altering a chattel in the actor's possession, (c) using a chattel in the actor's possession without authority so to use it, (d) receiving a chattel pursuant to a sale, lease, pledge, gift or other transaction by one intending to acquire for himself or for another a proprietary interest in it, (e) disposing of a chattel by a sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it, (f) misdelivering a chattel, or (g) refusing to surrender a chattel on demand.[12]

Common-law Actions

At common law the torts of battery, assault, false imprisonment, trespass to land, and trespass to chattels, were all generally known as "trespasses" because of the forms of action by which they were redressed. Thus, an action of trespass was the form used to redress "trespasses" to the person; trespass quare clau-

[9] 1 Restatement, § 217, p. 553. For the circumstances or conditions under which such a trespass makes the actor liable, see 1 Restatement, §§ 218–220, pp. 555–565.

[10] 1 Restatement, § 221, p. 565.

[11] See 1 Restatement, § 222, p. 569. See also, id., § 225, p. 577.

[12] 1 Restatement, § 223, p. 572. For the conditions under which a conversion makes the actor liable to another, see 1 Restatement, §§ 225–242, pp. 577–618.

sum fregit, (wherefore he broke the close), for trespasses to land; and, trespass de bonis asportatis, (for goods carried away), for trespasses to chattels.

Negligence

Negligence is a term used to designate a particular type of tortious conduct and is not associated with any specific interest and harm which is characteristic of the terms used to denote most particular torts. It consists "in failing to fulfill a legal duty to exercise a proper degree of care, whereby damage results to one to whom such legal duty is owing." [13] During the more immature stages of tort law no distinction was made in regard to whether a "trespass" was committed intentionally or negligently and such wrongs were actionable in trespass whether the conduct causing them was intentional or negligent; but during the nineteenth century, negligence came to be recognized as a distinct type of tortious conduct more properly remediable by the action of "trespass on the case." Thereafter, when a trespass to the person, land, or chattels was committed intentionally, the form of action was either trespass for personal harm, trespass q. c. f., or trespass d. b. a.; whereas if similar harms were committed negligently the form of action was case. The distinction is important because contributory negligence on the part of plaintiff is ordinarily a good defense in an action based on defendant's negligence but it is no bar to recovery if the defendant's tortious conduct was intentional. Further, in most actions of trespass, or those based on tortious conduct of the intentional type, actual damages need not be proved; but, generally, in actions based on negligence, only damages proved are recoverable.

Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; and, unless the actor is a child or an insane person, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.[14] In regard to the elements of a cause of action for negligence the

[13] Chapin on Torts, § 104, p. 499.

[14] See 2 Restatement, §§ 282, 283, pp. 738, 741, 742. The general rule is that an infant is responsible for his torts, but in determining whether or not a child has been negligent his conduct is to be judged by the standard of behavior to be expected from a child of like age, intelligence and experience. However, in regard to the child's capacity to realize the existence of a risk, the individual qualities of the child are taken into account. In the absence of a contrary statute, a parent, as such, is not liable for a tort of his child.

rule is that, "The actor is liable for an invasion of an interest of another, if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion." [15]

As the elements of a cause of action for negligence indicate, in order that the actor shall be liable for another's bodily harm or harm to another's interest in the physical condition of land and chattels, it is necessary not only that the actor's conduct be negligent toward the other but also that the negligence of the actor be a legal cause of the other's harm.[16] "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." [17]

Ultrahazardous Conduct or Activity

The third type of tortious conduct is that which is designated by the term "ultrahazardous." For example, the manufacture, storage, transportation and use of high explosives. Such conduct or activity is not necessarily unlawful in the sense that it is contrary to criminal law or prohibitory statutes, but may be, and usually is, regarded as being for the common good. However, as an activity is not ultrahazardous unless it "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage," [18] the law imposes the risk of such harm on those who engage in such activities, the rule being that, "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." [19] But there are exceptions to the rule and it does not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as

[15] 2 Restatement, § 281, p. 734.

[16] See 2 Restatement, §§ 430, 497, pp. 1156, 1157, 1287.

[17] 2 Restatement, § 431, p. 1159.

[18] 3 Restatement, § 520, pp. 42, 43.

[19] 3 Restatement, § 519, p. 41.

a public officer or employee or as a common carrier; nor does it apply where the person harmed by the unpreventable miscarriage of an ultrahazardous activity has reason to know of the risk which makes the activity ultrahazardous and takes part in it, or brings himself within the area which will be endangered by its miscarriage without a privilege, or in the exercise of a privilege derived from the consent of the person carrying on the activity, or as a member of the public entitled to the services of a public utility carrying on the activity. Further, a plaintiff is barred from recovery for harm caused by the miscarriage of an ultrahazardous activity if he intentionally or negligently causes the activity to miscarry, or after knowledge that it has miscarried or is about to miscarry, he fails to exercise reasonable care to avoid harm threatened thereby. However, a plaintiff is not barred from recovery for harm done by the miscarriage of an ultrahazardous activity by his failure to exercise reasonable care to observe the fact that the activity is being carried on or by intentionally coming into the area which would be endangered by its miscarriage.[20]

Liability of Possessors of Animals

The following general rules apply to the possessors of animals: (1) A possessor of livestock which intrude upon the land of another is liable for their intrusion and for any harm done while upon the land to its possessor or a member of his household although the possessor of the livestock exercised the utmost care to prevent them from intruding.[21] However, this rule is subject to the following exceptions: (a) A possessor of land who by the common law applicable to that part of the State in which the land is situated or by statute, is required to fence his land to prevent the intrusion of the livestock is barred from recovery against the possessors of intruding livestock if he fails to erect and maintain the required fence; (b) A possessor of livestock which are being driven upon a highway is liable for their intrusion upon land abutting thereon only if he has failed to exercise reasonable care to prevent them from straying or to remove them from the abutting lands upon which they have strayed.[22] (2) A possessor of a wild animal is subject to liability to others,

[20] See 3 Restatement, §§ 521, 523, 524, pp. 47, 49, 52.

[21] 3 Restatement, § 504(1), p. 2. "Livestock" includes such animals as horses, cattle, pigs and sheep, but it does not include dogs and cats. See 3 Restatement, p. 3.

[22] 3 Restatement, §§ 504(2), 505, pp. 2, 10.

except trespassers on his land, for such harm done by the animal to their persons, lands or chattels as results from a dangerous propensity which is characteristic of wild animals of its class or of which the possessor has reason to know, although he has exercised the utmost care to confine the animal or otherwise prevent it from doing harm, except where the animal has gone out of his possession and returned to its natural state as a wild animal indigenous to the locality, or unless the possession of the wild animal was in pursuance of a duty imposed upon the possessor as a public officer or employee or as a common carrier.[23] (3) A possessor of a domestic animal which he has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm caused thereby to others, except trespassers on his land, although he has exercised the utmost care to prevent it from doing the harm, unless the possession of the animal is in pursuance of a duty imposed upon the possessor as a public officer or employee or as a common carrier.[24]

Deceit

The fundamental rules regarding deceit and fraudulent concealment in business transactions are as follows: (1) One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation.[25] (2) One party to a business transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other as though he had stated the nonexistence of the matter which the other was thus prevented from discovering.[26]

Concerning information negligently supplied for the guidance of others, the rule is: One who, in the course of his business or profession, supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon the information if (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting,

[23] See 3 Restatement, §§ 507, 508, 517, pp. 13, 17, 36.

[24] See 3 Restatement, §§ 509, 517, pp. 19, 36.

[25] 3 Restatement, § 525, p. 59.

[26] 3 Restatement, § 550, p. 116.

and (b) the harm is suffered by the person or one of the class of persons for whose guidance the information was supplied, and because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.[27]

Misrepresentations or nondisclosures in certain non-business transactions may also be actionable, as, for example, fraudulent misrepresentations inducing gifts to the maker of such misrepresentations or to third persons; fraudulent nondisclosures of physical conditions by one spouse from the other which make the marital relation dangerous; fraudulent misrepresentations of a third person's fitness for or freedom to marry; fraudulent misrepresentations inducing tortious acts or omissions by others.[28]

Defamation

To create liability for defamation there must be an unprivileged publication [29] of false and defamatory matter of another which (a) is actionable irrespective of special harm, (actionable per se), or (b) if not so actionable, is the legal cause of special harm, that is, harm of a material and generally of a pecuniary nature to the other.[30] A communication is defamatory, if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[31]

A defamatory communication is either in the form of libel or in the form of slander. Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words. Slander, on the other hand, consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those which constitute libel.[32]

As for defamations actionable per se, or irrespective of special harm, the fundamental rules are: (1) One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom.[33] (2) One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a slander is liable to the other although no special harm or loss of reputation results if the publication imputes to the other (a) a criminal offense, or (b) a presently existing venereal or other loathsome and communicable disease, or (c) conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office, or (d) the other being a woman, acts of unchastity.[34]

In regard to slanders not actionable per se the rule is: "One who falsely and without a privilege to do so publishes a slander which, although not actionable per se, is the legal cause of special harm to the person defamed, is liable to him." [35]

Slander of Title

One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby, commits the tort known as "slander of title" and is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.[36]

Wrongful Prosecution of Criminal Proceedings

The primary principles relating to the wrongful prosecution of criminal proceedings are: (1) A private person who initiates, or who procures the institution of criminal proceedings against another who is not guilty of the offense charged, commits the tort of malicious prosecution and is liable to him for the harm done thereby if the proceedings (a) were initiated without probable cause, and primarily because of a purpose other than that of bringing an offender to justice, and (b) have terminated in favor of the accused.[37] (2) A private person who initiates criminal proceedings against another upon probable cause and for a proper purpose and thereafter takes an active part in pressing the

27 See 3 Restatement, § 552, p. 122.

28 See 3 Restatement, c. 23, pp. 131–135.

29 "Publication" of defamatory matter means "its communication intentionally or by a negligent act to one other than the person defamed." 2 Restatement, § 577, p. 192.

30 See 3 Restatement, § 558, p. 139.

31 3 Restatement, § 559, p. 140.

32 See 3 Restatement, § 568, p. 159.

33 3 Restatement, § 569, p. 165.

34 See 3 Restatement, § 570, p. 170.

35 3 Restatement, § 575, p. 185.

36 See 3 Restatement, § 624, p. 325.

37 See 3 Restatement, § 653, p. 382.

proceedings after discovering that there is no probable cause therefor, is liable for the harm thereby caused to the accused if the proceedings have terminated in his favor, unless he is guilty of the offense charged against him.[38]

Wrongful Initiation of Civil Proceedings

The general rule applicable to the wrongful initiation of civil proceedings is: One who initiates or procures the initiation of civil proceedings against another is liable to him for the harm done thereby, if (a) the proceedings are initiated without probable cause, and primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings are based, and (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.[39] Corresponding rules apply where civil proceedings causing an arrest or a deprivation of property, or proceedings alleging insanity or insolvency, or proceedings before an administrative board are wrongfully instituted, or where civil proceedings are repeatedly initiated wrongfully.[40]

Abuse of Process

The general principle which governs the tort known as abuse of process is that "one who uses a legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby." [41] For example, P obtains a judgment against D for a debt owed by D, and after the debt has to P's knowledge been paid, P takes out execution on the judgment. P is liable to D for abuse of process.

Interferences in Domestic Relations

The general principles relating to the torts of alienation of a wife's affection, inducing a wife to separate from or refuse to return to her husband, and criminal conversation with a married woman, all of which are characterized as "direct" interferences with the marriage relation, are as follows: (1) One who, without a privilege to do so, purposely alienates a wife's affections from her husband, is liable for the harm thereby caused to any of his legally protected marital interests.[42] (2) One who, without a

[38] 3 Restatement, § 655, p. 390.

[39] 3 Restatement, § 674, p. 440.

[40] See 3 Restatement, §§ 677–680, pp. 454–459.

[41] 3 Restatement, § 682, p. 464.

[42] 3 Restatement, § 683, p. 469.

privilege to do so and for the purpose of disrupting the marriage relation, induces a wife to separate from her husband or not to return to him after she has separated from him, is liable to the husband for the harm thereby caused to any of his legally protected marital interests.[43] (3) One who, without the husband's consent, has sexual intercourse with a married woman is liable to the husband for the harm thereby caused to any of his legally protected marital interests.[44]

Under the same conditions as would permit the husband to recover for similar wrongs, one who alienates the affections of a husband, or induces a husband to separate from his wife or not to return to her, or who has sexual intercourse with him is liable to the wife for harm thereby caused to any of her legally protected marital interests.[45]

The general principle governing "indirect" interferences with the marriage relation and which permits an action by the husband for harm caused by a tort against the wife is that "one who by reason of his tortious conduct is liable to a married woman for illness or other bodily harm is subject to liability to her husband for the resulting loss of her services and society, including any impairment of her capacity for sexual intercourse, and for any reasonable expense incurred by him in providing medical treatment." [46] However, no action is permitted to the wife for harm caused by a tort against the husband as she is not entitled to his services as he is entitled to hers. A tort committed against the husband does not deprive the wife of the support to which she is entitled, and the husband may recover from the tortfeasor for any loss of earning power which he may suffer; consequently if the wife were permitted an action against the tortfeasor for loss of support the result would be double recovery.[47]

Torts of Married Women; Liability

At common law, a husband during coverture "is liable for the torts committed by his wife, either before or during coverture. This liability ceases, however, when the coverture is determined by the death of either party, or by a divorce. The rules govern-

[43] 3 Restatement, § 684, p. 475.

[44] 3 Restatement, § 685, p. 477.

[45] See 3 Restatement, § 690, p. 486.

[46] 3 Restatement, § 693, p. 492. As the statement of the rule indicates, the action permitted the husband is in addition to the action which the wife has for the violation of her seperate and distinct interest and which entitles her to recover for the injuries she has suffered.

[47] See 3 Restatement, § 695, pp. 496, 497.

ing a wife's liability for her own torts are these: (a) She is liable, jointly with her husband during coverture, and solely after his death or a divorce, (1) for torts committed in his absence, whether committed by his direction or command, or not, [and] (2) for torts committed in his presence, but not by his direction or command, express or implied. (b) She is not liable at all for torts committed in his presence, and by his direction or command, but is excused on the ground of coercion. (c) Torts committed by a wife in her husband's actual or constructive presence are presumed to have been committed by his direction or command; but this presumption is prima facie only, and may be rebutted." [48]

However, these rules of the common law have been greatly modified in most of the states by statutes removing the disabilities of married women, and by statutes taking from the husband the rights which the common law gave him in respect to his wife's property. Thus, "(a) In some states a husband is no longer liable for the torts of his wife, unless he participated in their commission. (b) In other states he is liable for her personal torts, like slander or assault, but not for torts committed in the control of her separate property." [49]

Interferences in the Parent and Child Relation

Rules relating to "direct" interferences with the relation of parent and child are as follows: (1) One who, without a privilege to do so, (a) abducts a minor child, or (b) induces it to leave its home with knowledge that the parent has not consented, or (c) with knowledge that it has left its home and that the parent is unwilling that the child should be absent, induces it not to return thereto or prevents it from so doing, is liable to the parent, who is legally entitled to the child's custody.[50] (2) One other than her husband who, without her parent's consent, has sexual intercourse with a minor female child is liable to (a) the parent who is entitled to the child's services for any resulting loss of services or ability to render services, and to (b) the parent who is under a legal duty to furnish medical treatment for expenses reasonably incurred or likely to be incurred for such treatment during the child's minority.[51]

[48] Madden on Persons and Domestic Relations, §§ 64, 65, pp. 206, 207.

[49] Madden on Persons and Domestic Relations, § 67, p. 207.

[50] 3 Restatement, § 700, p. 502.

[51] 3 Restatement, § 701, p. 505.

Rules relating to "indirect" interferences with the relation of parent and child are as follows: (1) One who by reason of his tortious conduct is liable to a minor child for illness or other bodily harm is subject to liability to (a) the parent who is entitled to the child's services for any resulting loss of services or ability to render services, and to (b) the parent who is under a legal duty to furnish medical treatment for any expenses reasonably incurred or likely to be incurred for such treatment during the child's minority.[52] (2) One who obtains the services of an unemancipated minor child without the consent or acquiescence of the parent who is entitled to the child's services is liable to such parent for the loss of the services of which the parent has been deprived.[53] (3) One who, without the parent's consent or acquiescence to the particular risk involved, employs a minor child in an occupation which in consideration of the age and experience of the minor is dangerous to it, is liable to (a) that parent who is entitled to the child's services for the loss of its services or ability to render services resulting from illness or other bodily harm sustained by the child in the course of such dangerous employment, and (b) that parent who is under a legal duty to furnish medical treatment for expenses reasonably incurred or likely to be incurred for the treatment of the child during its minority.[54]

Interferences in Business Relations

The primary rules which relate to interferences in business relations are as follows: (1) One who engages in a business primarily for the purpose of causing loss of business to another and with the intention of terminating the business when that purpose is accomplished is liable to the other for the loss so caused.[55] (2) One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if (a) one of the purposes of the enactment is to protect the other against unau-

[52] 3 Restatement, § 703, p. 509. As the statement of the rule indicates, the action permitted the parent is in addition to the action allowed on behalf of the child for the violation of the child's separate and distinct interest and which permits recovery for the injuries the child has suffered.

[53] 3 Restatement, § 706, p. 516.

[54] 3 Restatement, § 707, pp. 516, 517.

[55] 3 Restatement, § 709, pp. 523, 524.

thorized competition, and (b) the enactment does not negative such liability.[56] (3) One who intentionally induces another to break a valid contract is liable for the damages legally caused by such act, unless his conduct is privileged.

The fraudulent imitating of another's goods, and the infringing of another's trade-mark are also tortious, the general principle being: One who (a) fraudulently markets his goods or services as those of another, or (b) infringes another's trade-mark or trade name, or (c) markets goods with an unprivileged imitation of the physical appearance of another's goods is liable to the other, except to the extent that the other has by his own conduct disabled himself from claiming such relief.[57]

Nuisances

Nuisances are either public or private, the difference being in the nature of the interest infringed. A public nuisance is one that infringes a public interest and is punishable as a crime, whereas a private nuisance is one that infringes private interests and is actionable as a tort. However, a nuisance which is public may give rise to an action by a private person if it causes a particular harm to some individual which differs in kind from that suffered by the public. In such a case the nuisance is regarded as private in respect to such individual.

A private nuisance is an unprivileged interference with certain easements and servitudes, or an unprivileged and relatively continuous interference with the use and enjoyment of land usually effected by such things as noises, odors, and smoke. The formula is that an actor is liable for such an invasion of another's interest in his private use and enjoyment of land, if: (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and (b) the invasion is substantial; and (c) the actor's conduct is a legal cause of the invasion; and (d) the invasion is either intentional and unreasonable, or unintentional and otherwise actionable under the rules which govern liability for negligent, reckless or ultrahazardous conduct.[58] The conduct necessary to make the actor liable under this rule may consist either of acts, or a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the invasion of the other's interest.[59]

[56] See 3 Restatement, § 710, p. 527.

[57] See 3 Restatement, § 711, p. 542.

[58] See Restatement of Torts, Tentative Draft No. 16, § 1, p. 17.

[59] See Restatement of Torts, Tentative Draft No. 16, § 3, p. 27.

PART 3

THE ADJECTIVE LAW

CHAPTER 21

REMEDIES

SCOPE OF THE ADJECTIVE LAW

89. Adjective law is the division of municipal law that consists of the precepts by which the substantive division of municipal law is administered.

When an interest protected by a primary legal right is infringed the subject or owner of that right is ordinarily entitled to legal redress and it is with such redress and the methods for obtaining it that the adjective law is concerned. This is the division of municipal law that contains the precepts which define and govern legal remedies and the procedures by which such remedies are obtained. This is the division of municipal law by which the legal sanctions of such law are applied; the division by which municipal law maintains its force. It is by this law that the judicial process operates.

REMEDIES IN GENERAL

90. A legal "remedy," in the broadest sense of the term, is any legally authorized means or sanction by which the infringement of a legally protected interest may be prevented, redressed, or compensated.

Remedies may broadly be divided into the following classes: (1) Extralegal (or extrajudicial) remedies, which are administered by the persons whose legally protected interests are infringed with or without the aid of others but without resort to gov-

ernmental agencies; and, (2) Legal (or judicial) remedies, which are administered only by governmental agencies. More particularly, remedies may be classified as of the following kinds: (a) Remedies by operation of law; (b) Remedies by act of the party injured, or by a third party acting for the injured party; (c) Remedy by agreement between the parties involved in a controversy; (d) Remedy by the parties involved in a controversy with the assistance of other private persons; and (e) Legal or judicial remedies, which are remedies obtainable only through governmental agencies, or the judicial process.

REMEDIES BY OPERATION OF LAW

(1) Retainer

This is a remedy which was allowed at English common law to an executor or administrator of an estate who was also a creditor of the deceased. It was the right which such an executor or administrator had to retain sufficient of the assets to pay the debt owed him, and this amount became his by operation of law. The remedy of retainer is of no practical importance in the United States.

(2) Remitter

Remitter at English common law was a remedy which applied when a person who had a good title to a parcel of land, but who had been ousted of possession, came into possession later under a defective title. He was then regarded as being "remitted" to his prior good title, (by operation of law), and held under it thereafter. Like the remedy of retainer, remitter is of no practical importance in the United States.

REMEDIES BY ACT OF INJURED PARTY

(1) Self-defense, Defense of Third Person, and Defense of Property

Self-defense is the protection of one's person or property from injury by another, and in respect of the protection of one's person the general principle is that the intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended or likely to cause death or serious bodily harm is privileged for the purpose of preventing the other from inflicting a harmful or offensive contact or other bodily harm

upon the actor if: (a) the other so acts as to lead the actor to know or reasonably to believe that the other intends to inflict such contact or harm upon him, and (b) the means which the actor uses in self-defense are reasonable in view of the character of the contact or bodily harm from which he is attempting to protect himself, and (c) the actor reasonably believes that such contact or harm can safely be prevented only by the immediate infliction upon the other of the offensive or harmful contact or other bodily harm.[1] The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm is privileged only when (a) the other so acts as to lead the actor reasonably to believe that he intends to inflict upon the actor a bodily contact or other harm, and (b) the actor reasonably believes that he is thereby put in peril of death or serious bodily harm or ravishment which can be safely prevented only by the immediate use of such self-defensive means; but this privilege does not obtain if the actor reasonably believes that he can, with complete safety, avoid the necessity of so defending himself (a) by retreating, if attacked in any place other than his dwelling place, or (b) by relinquishing the exercise of any right or privilege to exclude intruders from his dwelling place or to prevent himself from being dispossessed thereof or to effect a lawful arrest.[2]

An actor is privileged to defend a third person from a harmful or offensive contact or other invasion of his interests of personality under the same conditions and by the same means as those under and by which he is privileged to defend himself therefrom provided (a) the actor reasonably believes that the circumstances are such as to give the third person such a privilege of self-defense and that his intervention is necessary for the protection

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[1] See 1 Restatement of the Law of Torts, § 63(1), p. 120.

[2] See 1 Restatement of the Law of Torts, § 65, pp. 134, 135. For statements of the privilege of self-defense against negligent conduct, see 1 Restatement of the Law of Torts, §§ 64, 66, pp. 132, 143.

"The intentional infliction upon another of a harmful contact by means intended or likely to cause death or serious bodily harm is privileged * * * although the actor reasonably believes that he can safely avoid the necessity of so defending himself, (a) by retreating if, but only if, he is attacked within his dwelling place which is not also the dwelling place of the other, or (b) by permitting the other to intrude upon or dispossess him of his dwelling place, or (c) by abandoning an attempt to effect a lawful arrest." 1 Restatement of the Law of Torts, § 65(2), p. 135.

of the third person; and, (b) provided further, that the third person is, or is reasonably believed by the actor to be, a member of his immediate family or household, or a person whom he is under a legal or socially recognized duty to protect.[3]

The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means not intended to cause death or serious bodily harm is also privileged for the purpose of preventing or terminating another's intrusion upon the actor's possession of land or chattels, if the other's intrusion is not privileged, the means used by the actor are reasonable, and the actor has first requested the other to desist from the intrusion, unless such request would be futile or useless; and, the intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels is also privileged, provided the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect.[4]

(2) Recaption

Recaption is the taking of a chattel from another; and the use of force by an actor executing this remedy against another is privileged if (a) the force is used for the purpose of regaining possession of the chattel; (b) the other has tortiously taken the chattel from the actor's possession or custody; (c) the actor is entitled as against the other to the immediate possession of the chattel; (d) the actor acts promptly after his dispossession or after his timely discovery thereof; (e) the actor first requests the other to give up possession of the chattel, except where the actor reasonably believes a request to be useless, dangerous to himself or a third person, or likely to defeat the effective exercise of the privilege; and, (f) the means employed are not in excess of those which the actor reasonably believes to be necessary to effect the recaption, and not intended or likely to cause death

[3] See 1 Restatement of the Law of Torts, § 76, p. 162.

[4] See 1 Restatement of the Law of Torts, §§ 77, 79, pp. 167, 168, 181, 182. For a statement of the privilege to inflict a harmful or offensive bodily contact or other invasion of another's interests of personality in defense against intrusion upon a third person's land or chattels, see 1 Restatement of the Law of Torts, § 86, p. 201.

or serious bodily harm.[5] The use of force against another for the purpose of assisting or acting for a third person in recaption of a chattel to the possession or custody of which the third person is entitled is also privileged, if the third person is so privileged and (a) the third person employs or requests the actor so to assist or act for him, or (b) the actor and the third person are members of the same immediate family or household, or (c) the third person's chattel is under the protection of the actor.[6]

(3) Entry

Entry is the taking of the possession of lands from another; and the use of force by an actor executing this remedy against another is privileged if (a) the force is used for the purpose of regaining possession of the land or of effecting an entry thereon; (b) the other has tortiously dispossessed the actor or his predecessor in title; (c) the actor is entitled as against the other to the immediate possession of the land; (d) the actor acts promptly after his dispossession or after his timely discovery thereof; (e) the actor first requests the other to give up the possession, except where the actor reasonably believes a request to be useless, dangerous to himself or a third person, or likely to defeat the effective exercise of the privilege; and, (f) the means employed are not in excess of those which the actor correctly or reasonably believes to be necessary to effect the entry, and not intended or likely to cause death or serious bodily harm.[7]

(4) Abatement of Nuisance

The abatement of a nuisance is the removal or termination of a nuisance; and an entry on land in the possession of another by a possessor of neighboring land (or by the owner of an easement which is injuriously affected) is privileged, if the entry is made: (a) for the purpose of abating a structure or other condition on the land which constitutes a private nuisance to the actor's interest in the other land; (b) at reasonable times and in a reasonable manner; and, (c) after the possessor upon demand has failed to abate the nuisance, or without such demand if the actor reasonably believes it to be impractical or useless. Under the same conditions, a private person to whom a public nuisance

[5] See 1 Restatement of the Law of Torts, §§ 100–106, pp. 224–238.

[6] See 1 Restatement of the Law of Torts, § 110, p. 242.

[7] See 1 Restatement of the Law of Torts, §§ 88–94, pp. 206–218.

causes or threatens a special harm, is also privileged to abate the nuisance.[8] In addition, an actor is privileged to intentionally intermeddle with chattels in the possession of another or to dispossess another of chattels for the purpose of abating a private nuisance created or maintained by the possessor, if such intermeddling or dispossession is a reasonable means of abating the nuisance, and if the possessor of the chattels upon demand has failed to abate the nuisance, unless the actor reasonably believes that such demand is impractical or useless.[9]

(5) Distress

Distress is the right of a landlord, at common law, to distrain chattels found upon leased premises when rent is in arrear. "This is a right growing out of the relation of landlord and tenant, and is not dependent upon agreement, and this remedy lies for all rents reserved which are certain. At common law, the distraint may be made by the lessor, or the assignee of the reversion, for all the rent due. It is now required, however, in most states, that a warrant be executed by a proper officer. At common law, any chattels found upon the premises could be distrained, whether belonging to the tenant, or to others. An exception, however, was made in favor of goods brought there in course of trade. The tendency of modern decisions and statutes is to restrict the right of distraining to the property of the lessee. There can be no distress for rent unless the relationship of landlord and tenant actually exists, and also an express contract to pay rent. Under the common law, the landlord had merely the right to keep the goods until the rent was paid. He could not, moreover, use them for his own benefit. Under the statutes, however, the goods may be sold, upon due notice, if they are not redeemed within the time fixed by the statutes. The remedy of distress for rent still exists in a number of our states, although the proceedings based thereon have been much modified by statute. In some jurisdictions, the remedy is held by judicial decisions to be obsolete. In other states, it has been expressly abolished by statute." [10]

[8] See 1 Restatement of the Law of Torts, §§ 201, 203(2), pp. 488, 501.

[9] See 1 Restatement of the Law of Torts, §§ 264, 270, pp. 659, 667.

[10] Burdick on Real Property, pp. 211, 212.

REMEDY BY AGREEMENT BETWEEN THE PARTIES

(1) Accord and satisfaction

An "accord" is an agreement between two persons whereby one of them undertakes to give and the other undertakes to accept something in satisfaction of a right of action which the latter has against the former; and the execution of such an agreement is a "satisfaction." Together they are called "accord and satisfaction." "A liability in tort or for breach of contract may be discharged by the parties making and performing a new agreement in lieu of the old obligation. The making of the agreement is called an accord, which is an ordinary bilateral contract; the performance of the agreement is called the satisfaction. In order to work a discharge, there must be a consideration for the promise of the party entitled to sue. It is further necessary that the accord shall be executed; otherwise the agreement is an accord without a satisfaction. The promisor must have obtained what he bargained for in lieu of his right of action, and he must have obtained something more than a mere fresh arrangement as to the payment or discharge of the existing liability. It is not meant by this that a promise can never be received as a satisfaction. If the promise and not its performance is accepted in satisfaction, it is a good accord and satisfaction without performance. In other words, a new contract agreed upon, and accepted, as a satisfaction, operates as an accord and satisfaction. The satisfaction may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment; or of new rights against the debtor and third persons, as in the case of a composition with creditors; or of something different in kind from that which the debtor was bound by the original contract to perform; but it must have been taken by the creditor as satisfaction for his claim in order to operate as a valid discharge. There can be no satisfaction without accord or agreement to that effect. The agreement may be implied; thus, if A owes B an unliquidated or disputed amount and sends B a check marked 'Payment in full,' if B cashes the check, he will be estopped to claim that the claim is not discharged." [11]

[11] Clark on Contracts, 4th Ed., pp. 679–681.

REMEDY BY THE PARTIES WITH ASSISTANCE OF OTHERS

(1) Arbitration

Arbitration is defined as "the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees." [12] Agreements to refer matters in dispute to arbitration are sometimes regarded as attempts to oust the courts of their proper jurisdiction, and to that extent will not be enforced. "The most common illustrations of such agreements are provisions in a building or construction contract for determination of questions by the architect or engineer, and in insurance policies for submission to arbitrators to determine the loss, though of course they are not limited to these contracts. An agreement to refer to arbitration, though so far valid that an action can be maintained for its breach, will not be specifically enforced, and does not oust the jurisdiction of the court; that is, it cannot be set up as a bar to an action brought to determine the very dispute which it was agreed to refer. Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid. It is very generally declared that an agreement to submit to arbitration the whole question of liability, and not merely those questions which affect the amount of damages, is void, even as a condition precedent. Upon principle, however, it seems that such a condition should be given effect in the one case as in the other, and that to do so is in no sense to oust the jurisdiction of the court. In the case of mutual associations, such as mutual fire insurance companies and mutual benefit societies, stipulations in the by-laws have been sustained which require a member to submit a claim to arbitration or otherwise to exhaust the remedies provided, as a condition precedent to a resort to the courts; and in some jurisdictions provisions have been sustained which make the decision of the arbitrators final and conclusive. Agreements attempting to deprive a party of the right to bring suit except in certain courts or in the courts of a certain jurisdiction are illegal." [13]

[12] Black's Law Dictionary, 3d Ed., p. 134.

[13] Clark on Contracts, 4th Ed., pp. 401–403.

Act of Feb. 12, 1925, c. 213, § 2, 43 Stat. 883, 9 U.S.C.A. § 2, provides that: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Several of the states have also enacted statutes of similar effect, making arbitration agreements irrevocable; and in 1925, the National Conference of Commissioners on Uniform State Laws approved the Uniform Arbitration Act, which treats of the subject of arbitration fully. For a list of the jurisdictions in which the latter act has been adopted, see the appendix.

LEGAL REMEDIES

91. Legal remedies are remedies which are administered only by governmental agencies, and are either penal or civil.

Penal remedies

The penal remedies consist of the punishments inflicted by state agencies upon persons convicted of crimes, and include fines, terms of imprisonment, and capital punishment or death. The degree and severity of a penal remedy depends upon, and is correlative to, the degree and severity of the crime committed by the person subject to it.

Civil remedies

The civil remedies consist of those which are administered by the courts in civil proceedings, as distinguished from criminal proceedings, and subdivide into the following general classes: (1) Remedies which were administered by the common-law courts; and, (2) Remedies which were administered only by courts of equity prior to the fusion of equity and common law. Of course, in those jurisdictions where equity and common law are still administered as separate systems, this division still technically exists. As has been indicated, one of the principal reasons for the development of the English equity system was the inadequacy of common-law remedies to meet the needs of growing society. In the ordinary case at common law the only remedy obtainable was a judgment requiring the unsuccessful litigant to pay the successful litigant a certain sum of money, and as the equity system evolved to correct this inflexibility by directing specifically whatever seemed necessary to do justice between the parties, the equitable remedies are naturally greater in number than the common-law remedies.

COMMON-LAW REMEDIES

92. Common-law remedies are classified as ordinary, or as extraordinary.

ORDINARY COMMON-LAW REMEDIES

(1) Restoration

The principal ordinary common-law remedies are (a) restoration; and, (b) damages. Restoration includes the remedies by which a successful litigant at common law could recover specific lands or chattels. For example, by succeeding in ejectment plaintiff could recover the possession of land; by succeeding in replevin or detinue plaintiff could recover possession of chattels.

(2) Damages

As used in law to designate a kind of remedy, the term "damages" denotes money, or a judgment for money, awarded as compensation for an injury done to a legally protected interest of the person realizing such remedy. Damages are classified as (a) nominal; (b) substantial; and, (c) exemplary.[14]

Nominal damages are defined as "damages awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage, as in the case of rights of bodily immunity or rights to have one's material property undisturbed by direct invasion. The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated."[15] Such damages are awarded merely as a recognition of some breach of a duty owed by defendant to plaintiff and not as a measure of recompense for

[14] For purposes of pleading, damages are also classified as either "general" or "special." This classification distinguishes those elements of loss or damage which need not be claimed or mentioned in the complaint in order to be the subject of proof and recovery at the trial, and those which must be specifically claimed and described if recovery for them is to be allowed. The distinction, for this purpose, is frequently defined as one between those losses which "necessarily" flow from the alleged wrong, and those which are not "necessary" results of such wrong. The former are "general" and need not be specifically pleaded; the latter are "special" and must be specifically alleged.

[15] McCormick on Damages, § 20, p. 85.

Nominal damages, which are usually fixed at some trivial amount such as one cent or one dollar, are distinct from small compensatory damages which are measured by the loss actually suffered.

loss or detriment sustained. An award of nominal damages recognizes that a legally protected interest has been infringed although no actual harm or loss has been sustained or shown. In such a case, it is often said that the law "presumes" some loss. "The earlier law of torts developed through the action of trespass, for violence to person or property; and for wrongs which are trespasses, the original rule still remains that proof of the defendant's wrongdoing enables plaintiff to recover nominal damages, though no loss or damage is shown beyond the invasion alleged. In the later evolution of tort law through the action on the case the rule developed that certain wrongs were not actionable at all unless actual loss or damage were shown, and this remains true of actions for negligent injury to person or property, and actions for deceit. In most other kinds of actions for torts, however, such as libel, nuisance, and malicious prosecution, proof of the wrongdoing entitles the plaintiff to nominal damages at least, regardless of loss or damage. In actions for breach of contract proof of damage is not essential; if the breach is proved and no damage shown, nominal damages will be given." [16]

Substantial damages are damages which are awarded for an actual loss sustained. Normally, in all kinds of cases, "the primary aim in measuring damages is to arrive at compensation, no more and no less," [17] and awards made for such purpose are designated as substantial or compensatory damages. As the primary aim in measuring damages is compensation, "this contemplates that the damages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred, and that the damages for breach of contract should place the plaintiff in the position he would be in if the contract had been fulfilled." [18]

As a rule the duty of measuring damages is on the jury, pursuant to standards set forth in the instructions of the judge, the common purpose being to determine the actual extent of the

[16] McCormick on Damages, § 22, pp. 87, 88.

[17] McCormick on Damages, p. 560.

[18] McCormick on Damages, § 137, p. 560.

In regard to actions ex contractu, the leading case of Hadley v. Baxendale, 9 Ex. 341, 1854, lays down the rule that damages for breach of contract can be recovered only for such losses as were reasonably forseeable, when the contract was made, by the party to be charged. "In other words, such losses must be either of the type usually resulting from breach of like contracts, or, if unusual, the circumstances creating the special hazard must have been communicated to the defaulter before he made the bargain." McCormick on Damages, § 138, p. 562.

plaintiff's injury and the correlative compensation he should receive. However, "the common law sanctions, in addition, the allowance, in a limited class of cases, of exemplary damages, sometimes called punitive or vindictive damages. They serve to give outlet, in cases of outrageous conduct, to the indignation of the jurors, and they are defended as furnishing a needed deterrent to wrongdoing, in addition to that furnished by criminal punishment." In other words, in certain cases, the jury may award damages, not for the purpose of compensating plaintiff for actual harm, but for the purpose of punishing defendant for his act. Generally, exemplary damages may be assessed "for any kind of malicious or wanton and oppressive misconduct, actionable as a tort. * * * In actions, however, upon mere private contracts (except the action for breach of promise of marriage), even where the breach is malicious and unjustified, exemplary damages are not allowable."[19] In nearly all of the states where the doctrine of punitive damages is applied,[20] the fact that the defendant is liable to criminal punishment or that he has already actually been criminally punished for the same act is no defense against the allowance of such damages; and while a few courts have held that to sustain an award of exemplary damages there must be a finding of substantial damage, the majority view is that a finding of a malicious wrong giving rise to a cause of action, even though only for nominal damage, is sufficient. "If a case of malicious wrong be proven which would warrant exemplary damages, the jury has a discretion whether to give them, and they should be so instructed." [21]

EXTRAORDINARY COMMON-LAW REMEDIES

(1) Mandamus

The principal extraordinary common-law remedies are (a) the writ of mandamus; (b) the information in the nature of a quo warranto; (c) the writ of prohibition; and, (d) the writ of habeas corpus. A writ of mandamus is an order issued by a common-law court of competent jurisdiction which commands a public officer, corporation, or an inferior court, to perform

19 McCormick on Damages, § 81, p. 286.

20 "In England and in all the states but four [Louisiana, Massachusetts, Nebraska, and Washington] the practice of allowing exemplary damages obtains, though the theory and extent of the remedy varies in the different states." McCormick on Damages, § 78, p. 278.

21 McCormick on Damages, § 84, p. 296.

some duty imposed by law upon such officer, corporation, or court. Originally used by the king to direct a subject to perform any desired act, this writ later came to be issued at the petition of a private person to compel the performance by an officer, corporation, or court, of some legal duty in cases where there was no ordinary common-law remedy which was adequate.

(2) Information in the Nature of Quo Warranto

An information in the nature of a quo warranto is an information which is presented to a common-law court for the purpose of testing the authority of a corporation or public officer to exercise functions assumed by such corporation or officer. Originally this remedy was administered through the writ of quo warranto, but this was gradually superseded by the information. The object and effect of this remedy is to compel the corporation or officer to show by what authority (quo warranto) certain functions are exercised.

(3) Prohibition

A writ of prohibition is an order issued by a superior court to an inferior court and which commands the inferior court to cease proceeding in a particular case because of matters involved therein in excess of its jurisdiction or within the jurisdiction of some other court. This writ issues to prevent a usurpation of jurisdiction by an inferior court and prohibits such court from proceeding further in an initiated cause which, by reason of its limited jurisdiction, it has no authority to determine.

(4) Habeas Corpus

"Habeas corpus," (you have the body), is the name given "to a variety of writs (of which these were anciently the emphatic words) having for their object to bring a party before a court or judge." Generally, a writ of habeas corpus is an order issued by a common-law court requiring a person in confinement to be brought before it for the purpose of testing the legality of the confinement. It is the summary remedy in all cases of false imprisonment and such a writ will issue whether the restraint be under cover of criminal or civil proceedings or without any show of justification. A writ of habeas corpus may ordinarily be applied for by the person detained, by some other person acting in his behalf, or by any one who has a right to his custody such as his parent or guardian.

EQUITABLE REMEDIES

93. Equitable remedies are remedies which were developed and administered by the English Court of Chancery.

In contrast to the form of the judgment at common law in favor of a successful plaintiff, which merely awarded to him a recovery of money or of specific property, "the typical relief granted by the chancellor was in the form of a command directed to the other party ordering him to do, or not to do, some act. Theoretically, there was no reason why the command could not require the performance of any act which the successful party might be equitably entitled to have performed, but practical considerations sometimes imposed restrictions on its scope." [22] Despite this broad power of the chancellor, however, the remedies granted in equity became repetitious with the result that various forms of particular remedies were established. The most common of these are described in the following paragraphs.

Injunction

A writ of injunction is an order of a court of equity which commands a person to do, or not to do, some specified act. If it commands the doing of some act it is called a "mandatory" injunction, whereas if it forbids certain conduct it is called a "prohibitory" injunction. "Where a party is entitled thereto, equity has never hesitated to grant relief in the form of a prohibitory order or decree. Formerly, it hesitated to give relief in the form of an affirmative order to do more than a single simple act; today decrees in affirmative form are freely granted." [23]

Specific Performance

A decree of specific performance is an order of an equity court which directs a party to a contract to perform his obligations thereunder. "The theory of equity in decreeing specific performance of a contract is the enforcement of the terms of the contract, as nearly as that can be done under the circumstances, not the imposition of a new obligation as redress for the breach of the contract by the defendant." [24]

[22] McClintock on Equity, p. 16.

[23] McClintock on Equity, § 14, p. 16.

[24] McClintock on Equity, § 52, p. 79.

Re-execution

Re-execution is the equitable remedy by which a lost or destroyed deed or other writing is restored. In other words, reexecution is the remedy whereby equity will compel the proper party or parties to execute a new deed or other similar instrument at the suit of a person claiming a right thereunder.

Reformation

Reformation is the applicable equitable remedy wherever, by reason of a mutual mistake of fact or the artifice of one of the parties, the written evidence of a contract fails to express accurately the terms actually agreed upon. In such a case equity will at the instance of the injured party order the writing corrected or reformed so as to express the actual agreement. "The mistake for which the relief of reformation of a written instrument can be obtained must be a mistake in the expression of the actual agreement of the parties, not a mistake entering into the agreement; and the relief, where given for mistake, is given solely to make the instrument express the contract intended by the parties; [however] reformation may be granted for fraud as a means of requiring the guilty party to make his representations good." [25]

Rescission

Rescission is the equitable remedy whereby the injured party to a contract which is voidable (usually on the grounds of fraud or duress) may have the contract abrogated or annulled. "The remedies at law for a defrauded party are an action for damages or avoidance by act of the party defrauded. Because of procedural limitations the theory of the common law is that the contract has been terminated by act of the plaintiff and that he only seeks recovery of what he has paid or delivered in performance of the contract. The theory of equity is that the contract is terminated only by the decree of the court, and originally not even the decree has this effect, but the court could accomplish its object only by ordering the defendant to surrender the instrument for actual cancellation or enjoin him from suing thereon at law. Today, the decree is commonly spoken of as effecting the rescission, the relief by surrender or injunction as supplemental." [26]

[25] McClintock on Equity, § 91, p. 160.

[26] McClintock on Equity, p. 142.

Bill Quia Timet

A bill quia timet is a bill in equity brought for the purpose of protecting the plaintiff against some future injury which he fears he may suffer by reason of an outstanding void or voidable instrument and which he cannot avoid by a present action at law. An example is a bill to cancel a negotiable instrument which is voidable while in the hands of the present holder but which may be enforced against plaintiff if it is transferred to a bona fide purchaser for value. Thus, "where a party fears that he will suffer an injury in the future because of some outstanding instrument which is void or voidable and is unable to bring an action at law in which his rights can be determined, equity may give him protection by canceling the instrument or enjoining future action by the other party with respect thereto." [27]

Control of Trusts and Trustees

Trusts are within the exclusive jurisdiction of equity, as trusts and rights arising therefrom were not recognized at common law. Hence, equity assumes control over all trust estates, compels trustees to perform their duties, and will remove trustees and appoint their successors where the interests of the beneficiaries render such remedy necessary.

Foreclosure of Mortgage

A suit in equity may be maintained to foreclose a mortgage and which may result in a strict foreclosure, or a decree of sale. The original method of foreclosing a mortgage was by a bill in equity "and at the present time courts of equity retain jurisdiction in foreclosure proceedings, unless a statutory form of foreclosure is made exclusive, even though other methods of foreclosure may be available." [28] The decree in a foreclosure suit by bill in equity may be either for strict foreclosure, or for the sale of the property. "In strict foreclosure, the decree cuts off, forthwith, the equity of redemption; that is, unless the mortgagor redeems within a limited time after the decree, the estate will become absolute in the mortgagee. The time allowed for such redemption is within the discretion of the court. Strict foreclosure, however, being harsh and inequitable, is not favored by the courts, but may be decreed, in some states, especially where the mortgagor is insolvent, and where the property would not sell

[27] McClintock on Equity, § 184, p. 329.

[28] Burdick on Real Property, p. 557.

for the amount of the mortgage debt. In most states, instead of a strict foreclosure, a sale of the mortgaged land is decreed. Instead, however, of directing the entire mortgaged premises to be sold, the decree may, in some states, order that only such part of the land as may be necessary to pay the debt shall be included in the sale. The amount due the mortgagee is paid him out of the proceeds of the sale, while any surplus is applied for the benefit of the mortgagor, in paying off other incumbrances according to their priority. The sale is made by an officer of the court or by the person designated by statute, and the manner of conducting it is usually prescribed by statute. In some states, before such a sale becomes effective, it must be confirmed by the court." [29]

Quieting Title

Quieting title is the term used to designate equitable remedies whereby the claimant of land may establish his title thereto free of clouds and adverse claims. "The original suit to quiet title was allowed to prevent the bringing of numerous actions of ejectment by the same claimant, and has largely disappeared since a judgment in ejectment has become conclusive, but the term is now used to include all suits in equity by a claimant to establish his title to the lands, such as bills to remove clouds on title and statutory suits to determine adverse claims." [30]

Partition

Partition is the dividing of land held by the owners of joint estates into distinct portions so that each may hold his share in severalty, and there may be partition of all kinds of joint estates except tenancies in entirety. "In the absence of statutes giving courts of law jurisdiction, partition suits are regularly brought in courts of equity, or on the equity side of courts having a united jurisdiction. In some states, however, the remedy is at law. Where the proceedings are made statutory, without designating the character of the suit, the prevailing view is that the proceedings are, nevertheless, equitable in their nature. In some states, probate courts are given power to make partitions, especially in connection with the settlement of the estates of decedents." [31]

[29] Burdick on Real Property, pp. 558, 559.

[30] McClintock on Equity, § 185, p. 331.

[31] Burdick on Real Property, pp. 274, 275.

Receiver

In aid of a suit in equity, "the court may appoint a receiver to take charge of the property in controversy and preserve it to protect the interests which may be subsequently established; [and] the use of this process has been developed in some cases to permit the court to administer the affairs of a corporation which is in financial difficulties, and preserve its character as a going concern." [32] The equity receiver is an officer of the court and administers the property intrusted to him under the direction and supervision of the court.

Account

An account is a detailed statement of receipts and disbursements occurring in the operation of a particular business or trust, and "one who has received from another money or other property to use for the benefit of that other acts in a fiduciary character, and owes an equitable duty to render an account which may be enforced in equity. Of course, a trustee is under an equitable duty to account to his beneficiaries, and a bill to compel him to render such an account if he has failed to do so will always lie. But the principle is not limited to cases of actual trusts; any one to whom money has been confided for the use of another is under a similar duty to account. An accounting between partners has been decreed by equity from very early times. An agent or factor to whom money or property is intrusted by his principal is a fiduciary who may be compelled by equity to account therefor. * * * [And], where there is a contract between the parties imposing on the defendant a duty to account, that obligation may be enforced in equity."[33] Further, "where the accounting by one who owes no equitable duty to account is so complicated that it would be difficult for a jury in an action at law to determine the true state of the account, equity may give relief because of the inadequacy of the remedy at law, even though the accounts are not mutual." [34]

Contribution

Contribution is the equitable remedy which may be obtained where one of several parties who are jointly liable on an obligation discharges the entire obligation or more than his proportionate share of it. In such a case equity will compel the others to contribute pro rata in order that each may share an equal burden. "This remedy of contribution originated in equity and still may be obtained there, even though the common law now provides a remedy which may be adequate. The proceeding in equity often has important advantages over that of law because of the power of equity to join all of the parties in one suit. The most frequent use of the remedy is in favor of one of several cosureties who has paid the debt for which they all were liable. It is also given to one who has redeemed from a mortgage property in which others have interests which benefit by the redemption; to a partner who has paid more than his proportionate share of the firm debts; and to a tenant in common who has paid taxes and other expenses for the benefit of the common property." [35]

[32] McClintock on Equity, § 205, p. 363.

[33] McClintock on Equity, § 194, pp. 346, 347.

[34] McClintock on Equity, § 195, p. 347.

Marshaling

The remedy of marshaling assets is one adopted by courts of equity in certain cases to protect so far as possible the liens of junior claimants. Thus, "where a senior claimant has a lien or charge on two different funds or pieces of property, and a junior claimant has a lien or charge on only one of them, equity will compel the senior to resort first to the fund or property on which he alone has the lien or charge, if it can be done without prejudice to the senior claimant or to third persons, or will subrogate the junior to the senior's lien against the other property." [36] Of course the application of the remedy is confined to cases where both of the obligations are against the same debtor.

Ne exeat

The writ of ne exeat is issued against a party who is subject to an equitable demand for the payment of money enforceable against his person and who is threatening to depart from the jurisdiction, for the purpose of causing his detention until he has given bond to perform the decree of the court. "Originally, it was a prerogative writ, but it has since been allowed by courts of equity for the protection of private equitable rights. In some of the states, the writ has been abolished by statute. It has been expressly recognized by the federal statutes [Jud.Code, § 261, 28 U.S.C.A. § 376] and by those of some of the states, and has

[35] McClintock on Equity, p. 350.

[36] McClintock on Equity, § 198, p. 352.

been exercised in other states as a part of the ordinary powers of equity vested in the courts. The writ, when issued, ordered the arrest of the party against whom it was issued and his detention until he gave bond to abide the decree of the court." [37]

Discovery

Discovery is defined as "the disclosure by the defendant of facts, titles, documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a cause or action pending or to be brought in another court, or as evidence of his rights or title in such proceedings." [38] As an equitable remedy the bill for discovery arose because there was no method at common law by which a party could obtain the evidence of the adverse party, or the production of books or papers that were in his possession; hence equity gave a bill of discovery in aid of the remedy at law. However, "the relief is today almost everywhere superseded by statutory provisions for the examination of the adverse party in actions at law or under the codes. In many jurisdictions it is held that these statutes provide the exclusive remedy and that separate bills for discovery can no longer be maintained. In other jurisdictions, the equitable relief may still be obtained, but it is not very often used, since the statutory proceeding is so much simpler." [39]

Perpetuation of Testimony

A bill to perpetuate testimony was an equitable remedy obtainable where no action was pending in which the rights of the parties could be determined and the one seeking the relief was not able to institute an action therefor. In such a case equity would permit him to maintain a bill to perpetuate testimony of witnesses to sustain his claim if there was danger that their evidence might be lost before the action was begun by the adverse party. "The evidence was taken by depositions which were admitted by the common-law courts as secondary evidence if the testimony of the witnesses themselves could not then be obtained, on principles similar to those applied to determine the admissibility of testimony given by witnesses at a former trial." [40] At the present time the taking of depositions to perpetuate testimony is generally regulated by statutes which do not require a separate suit for the purpose.

[37] McClintock on Equity, pp. 357, 358.

[38] Black's Law Dictionary, 3d Ed., p. 587.

[39] McClintock on Equity, p. 354.

[40] McClintock on Equity, p. 355.

Creditors' Bill

A court of equity will lend its aid to enforce the judgments of the common-law courts in certain cases where its assistance is necessary for such result. Thus, a plaintiff (or "creditor") who has obtained a common-law judgment which he is unable to satisfy by common-law process may maintain a bill in equity to discover concealed assets of the judgment debtor, to subject equitable assets to the payment of the judgment, or to set aside fraudulent conveyances. Bills for any of these forms of relief are designated "creditors' bills." [41]

Interpleader

Interpleader is the equitable remedy which protects a debtor or holder of property who is willing to pay or deliver the fund or property to the person entitled thereto, from conflicting claims by different claimants. "Though he admits that he owes the debt or holds the property, and is willing to pay or deliver it to the person entitled to receive it, he cannot safely do so, because payment or delivery to one of the claimants would be no bar to liability to the other if the latter succeeds in establishing his right. The relief afforded is to permit the debtor or stakeholder to pay the money or deliver the property into court and compel the adverse claimants to interplead between themselves to determine their respective rights to the fund or property. The remedy of interpleader was not originated by the chancellors, but they

[41] "The necessity for the use of a bill in equity to discover concealed assets has been very generally obviated by statutes providing for supplementary proceedings in aid of execution, though it has been held that a statutory remedy to enable a judgment creditor to reach assets fraudulently concealed does not preclude resort to a creditor's bill in equity unless there is manifested a legislative intent to make the statutory remedy exclusive." McClintock on Equity, p. 359.

Of course, a conveyance in fraud of creditors was not valid at common law, but the only legal remedy available was to levy upon and sell the interest of the debtor in the property and then sue to recover possession of the property from the fraudulent grantee. Not only did this require a circuity of action, but it necessitated the making of the sale before the invalidity of the conveyance had been judicially determined, so that the sale was not apt to produce any substantial price. Obviously, such a remedy was not adequate, and, consequently, equity gave relief by a bill to set aside the conveyance.

adopted it from the common law, where it was allowed in a limited number of cases, chiefly in actions of detinue against a bailee where there were joint bailors on condition, or a third person claimed as buyer from the bailor subsequent to the bailment, or detinue against a finder where more than one person claimed to be the owner of the goods. Where the common-law action was not detinue, this relief could not be obtained, and the chancellors began to grant interpleader in such cases." [42]

Bills of Peace

A bill of peace is the equitable remedy which is obtainable for the purpose of preventing the hardship which would result from the necessity of prosecuting or defending numerous actions at law in order to protect a legal right. "Bills of peace were first allowed in cases where one party claimed a right which was contested by many, such as a controversy between a lord and his tenants over rights of common. Next, the remedy was extended to cases where a party claimed an exclusive right which was disputed by numerous parties who did not claim under a common title. Then it was allowed where there were numerous claims by different parties against one party, where all of the claims could be determined by the decision of a single issue." [43]

[42] McClintock on Equity, pp. 315, 316.

[43] McClintock on Equity, pp. 305, 306.

CHAPTER 22

COURTS AND THEIR JURISDICTION

COURTS IN GENERAL

94. The term "court" is used in law to denote:

(a) A tribunal ordained pursuant to law for the administration of justice, and

(b) The place where such a tribunal functions.

Thus, when the "jurisdiction of the court" or the "decision of the court" is spoken of, the term "court" denotes a tribunal which exercises judicial functions and administers justice; but when it is said that a person "comes into court" or "appears in court" the place where such a tribunal functions is the subject.

The word "court" is also often used as a synonym of "judge," and the judge of a court, while presiding as such, is commonly referred to as "the court." Further, the words "court" and "judge" are frequently used interchangeably in statutes, but strictly speaking the two are not the same. A judge is an instrumentality of the court, the human agency through and by which most of the power and authority of the court are usually asserted and exercised, but the exercise of such power and authority may require other human agencies, for example a jury, and the term "court" may be used to denote a judge and jury. Hence, a judge is merely a part of the unit or court, and the term "court" is broader and more inclusive than the term "judge." Also, "a judge not presiding in court, or a judge in vacation, is not a court. Proceedings held at a time or place, or in a manner, other than required by law, though in the personal presence and under the direction of the judge (and even more clearly if held

in his absence), are coram non judice [meaning before one not a judge; before a person not properly exercising the authority of a judge] and void. By force of statutes or of rules established by courts as essential to the due administration of justice, certain ancillary acts, such as extending the time for filing papers, and certain emergency acts, such as granting a temporary restraining order, may lawfully be done by the judge in vacation or at chambers (i. e., at his office or wherever he may be found, when not presiding in court). But such exceptions are comparatively few, and the strong general principle is that the time and place designated by law and the presence of the judge, acting judicially, are the union and combination of time, place, and person that constitute a court."[1]

JURISDICTION

95. The jurisdiction of a court is its authority to hear and apply the law to cases properly presented to it for its decision.

Jurisdiction ordinarily includes "the power to entertain complaints and questions of law duly submitted for decision; to compel a defendant to appear and answer a complaint, or to punish him for not doing so; to take property in dispute into the custody of the law; to hear the contentions of adversary parties; to compel the production of evidence and the attendance of witnesses; to determine questions of right and declare the law in respect to all matters properly submitted; and to enforce, with the aid of the executive department, the judgment, order, or decree made or rendered on such a hearing."[2]

Original and Appellate Jurisdiction

Original jurisdiction is the authority of a court to hear and decide a case in the first instance, whereas appellate jurisdiction is the authority of a court to review and correct the action of a subordinate or inferior tribunal or court. "It is the policy of the law to provide courts of original jurisdiction, or trial courts, sufficient in point of numbers and place of location to be accessible to the people. It is also the policy of the law to allow a defeated party to appeal his case to a higher court for the correction of errors. The lower court may have erred in its declaration or application of the law, or the evidence may be insuffi-

[1] Bowman on Elementary Law, Part I, pp. 217, 218.

[2] Bowman, § 108, p. 218.

cient in any reasonable view to support the verdict or finding upon which the judgment is based. In either case, it is desirable that there be a higher tribunal which may correct the error and state the law authoritatively. A chief purpose in providing such a review is to make the law uniform throughout the territory over which the jurisdiction of the appellate tribunal extends."[3]

Exclusive and Concurrent Jurisdiction

Exclusive jurisdiction is the authority of a court to hear and decide a case which cannot be heard and decided by any other tribunal or court, whereas concurrent or coordinate jurisdiction is the authority of a court to hear and decide a case which may have been heard and decided by another tribunal or court, if the case had been presented to such other agency. For example, the jurisdiction of the federal courts is in some cases exclusive of the state courts; in others the jurisdiction of the state courts is exclusive of the federal courts; and in still others the jurisdiction of the two is concurrent. Further, in populous centers there are often different state courts with concurrent jurisdiction over various types of cases. "When two courts have concurrent jurisdiction over a certain subject-matter, a plaintiff may at his option bring his action in either. When, however, he has exercised his option, the court which he has chosen ordinarily secures sole jurisdiction in that particular case."[4]

General and Special Jurisdiction

Courts are either courts of general jurisdiction or courts of special jurisdiction, a court of general jurisdiction being one with authority to hear and decide a wide variety of cases, whereas a court of special or limited jurisdiction is one which has authority to hear and decide cases of particular classes only. For example, it is common in the United States to assign to a "probate" or "surrogate's" court jurisdiction over the administration and distribution of the estates of deceased persons, and such courts are courts of "special" or "limited" jurisdiction. However, after all such special matters have been assigned to various courts of limited jurisdiction, there is always some court which has the residue of original jurisdiction and the jurisdiction of such court is "general."

[3] Bowman, p. 109.

[4] Bowman, p. 219.

Elements of Jurisdiction

A judgment made by a court without jurisdiction is void. To render its judgment valid and its jurisdiction complete, in an action in personam, the court must have jurisdiction over the subject of the action and the persons to be affected by its judgment; in a proceeding in rem, the court must have jurisdiction over the subject of the action and the res or property in contest. By jurisdiction over the subject of the action is meant "the lawful power to hear and determine the kind of case or controversy presented for decision. It is given by the law which creates the court and cannot be conferred by consent of the parties. An assumption by a court of jurisdiction over a subject not granted it by law renders its judgment, not merely erroneous, but wholly void. Such a judgment may not only be set aside at any time by the court which rendered it, but it may be declared to be void by any court to which the question of its validity is presented in any proceeding properly before the court for decision."[5]

An action in personam, for example a suit for damages or for an injunction, is one which seeks to lay a personal duty or liability upon the defendant and which will require or necessitate some personal act by him in conformity with the judgment or decree of the court. "In an action of this kind, the court must have jurisdiction over the subject of the action and must also acquire jurisdiction over the parties. Jurisdiction over the plaintiff is acquired by his voluntary appearance before the court, either in person or by attorney, and his application for relief. Jurisdiction over the defendant is acquired either by service or process (e. g., a writ of summons), within the territorial limits of the jurisdiction, upon the defendant personally, or by his voluntary appearance, either in person or by attorney. In some states, 'substituted' service upon a person domiciled within the state, by leaving the summons at his last known place of residence, or by other means reasonably calculated to bring the pendency of the action to his notice, has been provided by statute, and has been held sufficient by the courts."[6]

A proceeding in rem, for example a modern statutory action to foreclose a mortgage, or a proceeding in attachment against chattels, is one which does not seek to lay a personal duty or liability upon the defendant but only to subject his interest in the res or property to the claim of the plaintiff. "In an action or proceeding of this kind, the court must have jurisdiction over the

[5] Bowman, p. 220.

[6] Bowman, p. 220.

subject and must acquire jurisdiction over the particular res in the manner provided by law. The method of acquiring such jurisdiction varies under the statutes of different states and naturally differs for different kinds of property. But, as a general rule, jurisdiction over the res is obtained by seizure under process of the court, or some act of equivalent import subjecting it to the dominion of the court, followed by such notification to the defendant of the pendency of the action as may be prescribed by the statute, as, for example, personal service upon him within the state, publication in a newspaper if he is a nonresident or cannot be found, or other means reasonably calculated to bring the fact to his knowledge. If the proper jurisdictional steps of taking the property into the custody of the court and notifying the defendant are taken, and the case is heard and determined by the court in the absence of the defendant, the judgment establishing the plaintiff's claim is valid, and the defendant is bound thereby, even though he was outside the territorial jurisdiction, and had no knowledge that the action was brought. If, however, the court in such a case should attempt to impose any personal duty or liability upon the defendant, its judgment would be to that extent void."[7]

COURTS OF RECORD

96. A court is either a court of record or a court not of record.

A court of record is defined as "one the judicial proceedings of which are required to be recorded for a perpetual memorial and testimony, and the formal records of which are entitled to be received in other courts as conclusive evidence of the facts therein set forth."[8] A court not of record, on the other hand, is one the records of which are not entitled to be so received in other courts. "Whether a court is or is not a court of record does not depend upon whether a record of its proceedings is kept or not, but rather upon the conclusiveness of its record in other courts. Most courts not of record keep accurate minutes of their proceedings. In this country courts are created by constitution or statute and it is customary for the constitution or statute which establishes a tribunal to state expressly whether it is or is not to be a court of record. Usually minor courts, such as justice of the peace courts and police courts, are not courts of record."[9]

[7] Bowman, p. 221.

[8] Bowman, § 113, p. 222.

[9] Bowman, p. 222.

ENGLISH COURTS OF ORIGINAL JURISDICTION BEFORE 1873

97. The principal English courts of original jurisdiction which functioned before 1873 were:

(a) The Court of King's (or Queen's) Bench,
(b) The Court of Common Pleas (or Common Bench),
(c) The Court of Exchequer,
(d) The Court of Chancery,
(e) The Court of Admiralty,
(f) The Court of Probate,
(g) The Court for Matrimonial Causes, and
(h) The London Court of Bankruptcy.

The American lawyer or law student finds in the decisions of the English courts the fountainhead of the common law, and it is therefore necessary for him, in order to appreciate the relative value of the decisions of the various courts, to know, at least in a general way, how jurisdiction was and is parceled out in England. In 1873, the courts of England were reorganized, but inasmuch as many cases very influential in this country were decided before that date, the old English system is of great practical importance to American students of law. An outline of both the old and new systems follows.

The Court of King's (or Queen's) Bench

This court can be traced back to a subdivision of the king's council in the twelfth century. "It was the most important of the common-law courts, receiving its name from the fact that in it the sovereign sat in person, though this very early became a fiction. It had two sides to its jurisdiction, known as the crown side and the plea side. On the crown side, it exercised exclusive original jurisdiction in all matters, civil and criminal, affecting the crown (pleas of the crown). On the plea side, its original jurisdiction was at first limited to civil wrongs which involved a breach of the king's peace; i. e., actions of trespass. Later it acquired original jurisdiction concurrent with the Court of Common Pleas in all common-law actions except real actions. It had also a supervisory authority over all inferior tribunals, magistrates, and corporations by means of the prerogative writs of mandamus, quo warranto, certiorari, prohibition, and habeas corpus, and had an appellate jurisdiction over the Common Pleas by writs of error."[10]

[10] Bowman, p. 223.
A "certiorari" is a writ issued by a superior court to an inferior court directing that the records of a particular cause pending before the latter be certified to the former court for review; whereas a "writ of error" is a process of a court of appellate or superior jurisdiction, issued at the instance of a party for or against whom a judgment has been rendered in an inferior court, which requires the removal of the record for review for error of fact or law in the proceedings as recorded.

The Court of Common Pleas (or Common Bench)

The Court of Common Pleas or Common Bench "was the oldest of the common-law courts, in the sense that it was the first to become distinct from the council. As its name indicates, it was the proper court for actions between private persons. It had exclusive original jurisdiction over real actions and the older personal actions, until the King's Bench and Exchequer obtained concurrent jurisdiction of the latter actions. Its monopoly over real actions was retained until these actions were abolished in 1833. It had power to issue writs of prohibition and habeas corpus, and had appellate jurisdiction by writs of error over inferior courts."[11]

The Court of Exchequer

The Exchequer, as the fiscal agency of the government, began very early to exercise judicial functions in cases which affected the royal revenue. "Later it acquired concurrent jurisdiction with the Common Pleas and King's Bench in all common-law actions, except real actions, and jurisdiction in equity concurrent with the Court of Chancery. Its judges were always known as 'Barons of the Exchequer,' instead of 'justices,' the name used in the other common-law courts. In 1842 its equitable jurisdiction was transferred by act of Parliament to the Court of Chancery."[12]

The Court of Chancery

The Court of Chancery is the court which originated to meet the needs of social and civil expansion and which needs could not or were not met by the common-law system. This is the court which developed the equity system. "During early centuries the court was held by the Chancellor, with the aid of the Master of the Rolls. In 1813 a Vice Chancellor was created, to assist the Chancellor in his judicial duties. After 1852, the Court of Chancery consisted of three Vice Chancellors and the Master of the Rolls, each sitting as a court of first instance, assisted by masters in chancery."[13]

[11] Bowman, p. 223.

[12] Bowman, pp. 223, 224.

[13] Bowman, p. 224.

The Court of Admiralty

The English courts of admiralty, originally created during the fourteenth century, were united into a single court in the fifteenth century. "It had an ordinary or 'instance' jurisdiction in civil and criminal cases, which during the 16th and 17th centuries, as conceded by the common-law courts, was confined to matters arising wholly at sea, and a prize jurisdiction, exercised in time of war in accordance with the principles of international law, in respect to property of belligerents captured at sea. Legislation in the 19th century restored much of the instance jurisdiction of which it had been deprived."[14]

The Court of Probate and the Court for Matrimonial Causes

Until the middle of the nineteenth century testamentary matters and matrimonial causes were within the jurisdiction of the ecclesiastical courts, but in 1857, "the jurisdiction of the ecclesiastical courts over testamentary matters was transferred by Parliament to a newly created Court of Probate, and that over matrimonial matters to a new Court for Matrimonial Causes. The judge of the Court of Admiralty was also the judge of each of these courts. The Court of Probate had original jurisdiction of the probate of wills and the settlement of the estates of persons dying intestate. Appeals from its decisions did not go to a court of intermediate appeal, but directly to the House of Lords. The Court for Matrimonial Causes had exclusive jurisdiction in divorce cases and all other suits, causes, and matters matrimonial, except the granting of marriage licenses."[15]

The London Court of Bankruptcy

"In 1731 jurisdiction in cases of bankruptcy was given to the Chancellor. In 1831 it was transferred to a new Court of Bankruptcy, which in 1869 was reorganized as the London Court of Bankruptcy."[16]

14 Bowman, p. 224.

15 Bowman, pp. 224, 225.

16 Bowman, p. 225.

In addition to the principal courts described, there were a great variety of other courts, many of which are still in existence. "Among these are the Chancery Courts of the Counties Palatine of Lancaster and Durham, which are courts of record and have the rank of superior courts; the courts of the Universities of Oxford and Cambridge; many borough courts, such as the Mayor's and City of London Court and the Liverpool Court of Passage; the sheriff's court; the coroner's court; the justices of the peace; the Courts of Session and Quarter Session; the courts of Oyer and Terminer and of Gaol Delivery; and the Central Criminal Court. There are also the County Courts, created by statute in 1846, of which there are now upwards of 450 in England and Wales. They have power to try any action at common law where the parties so agree, and have a regular jurisdiction of matters involving small amounts in cases at common law, or in equity, probate, and admiralty, and an unlimited jurisdiction in bankruptcy. Statistics show that by far the greater number of the cases decided in England are decided in the County Courts." Bowman, p. 225, note.

17 Bowman, pp. 225, 226.

ENGLISH COURTS OF INTERMEDIATE APPEAL BEFORE 1873

98. The principal English courts of intermediate appeal which functioned before 1873 were:

(a) The Court of Exchequer Chamber,

(b) The Court of Appeal in Chancery,

(c) The Full Court for Matrimonial Causes, and

(d) The Court of Crown Cases Reserved.

The Court of Exchequer Chamber

The title "Exchequer Chamber" had different applications. "Decisions of the Court of Exchequer in common-law cases were reviewed on writ of error by the judges of the King's Bench and Common Pleas, sitting together, and decisions of the King's Bench were reviewed in like manner by the judges of the Exchequer and Common Pleas; and both of these reviewing tribunals were called the Court of Exchequer Chamber. Cases in the King's Bench on appeal from the Common Pleas, however, were not reviewed by the Exchequer Chamber, but went directly to the House of Lords. The name 'Exchequer Chamber' had yet a third meaning. Points of law argued in any of the three courts of common law might be reargued before the judges of all three courts and the Lord Chancellor, and this combined court was also called the Court of Exchequer Chamber. Its function was merely advisory; judgment was always pronounced by the court in which the case originated. In 1830 the Courts of Exchequer Chamber were consolidated, and thereafter the decisions of each of the three courts of common law were reviewed by a Court of Exchequer Chamber which consisted of the judges of the other two."[17]

The Court of Appeal in Chancery

In 1852, two Lord Justices in Chancery were appointed to sit, either with or without the Chancellor, as a court of intermediate appeal for cases appealed from the Court of Chancery and the

London Court of Bankruptcy. This tribunal constituted the Court of Appeal in Chancery.

The Full Court for Matrimonial Causes

The Full Court for Matrimonial Causes was composed of the Lord Chancellor and the chief justices and senior associate justices of the three common-law courts, and had jurisdiction to review the decisions of the judge ordinary of the Court for Matrimonial Causes.

The Court of Crown Cases Reserved

"In the 17th century the rule became established that, in cases of acquittal in criminal prosecutions, the state could not obtain a new trial for any cause; and this is still the law both in England and the United States. In cases of conviction, it was an old practice for the trial judge, if he felt a doubt as to a point of law, to reserve the question for informal discussion with the other judges of the bench. If in their opinion the law did not warrant a conviction, the accused was acquitted, or if sentence had already been given against him, he was recommended for a pardon. This practice was given statutory authority by the establishment in 1848 of the Court of Crown Cases Reserved. It was entirely at the discretion of the trial judge, however, whether to reserve the question for the consideration of the court; hence the accused had no right of appeal, even in cases of manifest error, but could secure relief only by applying for a pardon."[18]

ENGLISH COURTS OF FINAL APPEAL BEFORE 1873

99. The English courts of final appeal which functioned before 1873 were:
(a) The House of Lords, and
(b) The Judicial Committee of the Privy Council.

The House of Lords was the court of final appeal with jurisdiction over cases from the courts of intermediate appeal and the Court of Probate, "instance" cases from the Court of Admiralty, and cases from the Scotch and Irish courts. The Judicial Committee of the Privy Council, on the other hand, was the court of final appeal with jurisdiction over cases from the ecclesiastical courts, prize cases from the Court of Admiralty, and cases from the courts of the dependencies and dominions.

[18] Bowman, pp. 226, 227.

ENGLISH COURTS SINCE 1873

100. All the principal English courts of original and intermediate-appellate jurisdiction, as well as many other courts then existing, were consolidated, by the Judicature Acts of 1873 and 1875, into the Supreme Court of Judicature, and this was divided into:
(1) The Court of Appeal, and
(2) The High Court of Justice.

The latter, for the convenient distribution of its business, was organized in the five following divisions:
(a) The Chancery Division,
(b) The Queen's Bench Division,
(d) The Common Pleas Division,
(e) The Exchequer Division, and
(f) The Probate, Divorce, and Admiralty Division.

At the end of 1880, the Queen's Bench, Common Pleas, and Exchequer Divisions were united into one division, then called the Queen's Bench Division and now the King's Bench Division.
In 1907 a Court of Criminal Appeal was established.
The House of Lords and the Judicial Committee of the Privy Council remain as the courts of final appeal.

The Court of Appeal

"The Court of Appeal has jurisdiction to review decisions of judges of the High Court of Justice, Divisional Courts, and inferior courts. It has power to make any order which ought to have been made by the court below, or such further orders as the justice of the case may require. It consists of the Lord Chancellor, the heads of the other two divisions of the High Court, the Master of the Rolls, five judges called 'Lords Justice of Appeal,' and all persons who have held the office of Lord Chancellor. As a rule, three judges constitute a sitting court of appeal. The court usually sits in two divisions, to hear common-law and equity cases, respectively, but there may be as many divisions as the number of judges permits. Any division may deal with any appellate business within the jurisdiction of the court."[19]

The High Court of Justice

The High Court of Justice has original jurisdiction and also appellate jurisdiction over inferior courts. Its judges consist

[19] Bowman, p. 229.

of the Lord Chancellor, who is president of the Chancery Division; the Lord Chief Justice, who is president of the King's Bench Division; the President of the Probate, Divorce, and Admiralty Division; and a number of associate judges who sit in the Chancery Division, the King's Bench Division, and the Probate, Divorce, and Admiralty Division. "A single judge of any division can ordinarily hold court alone and exercise the full authority of the High Court; but certain matters must come before a Divisional Court, consisting of two or more judges sitting together. A judge of any division is eligible to sit in any other division. Any judge or Divisional Court may apply equity, and in cases where the rules of law and equity conflict it is provided that the rules of equity shall prevail. A liberal code of civil procedure is in effect, the rules of which may be revised by the Supreme Court of Judicature; i. e., by the judges in conference."[20]

The distribution of the judicial business of the High Court of Justice among the divisions and judges of the court is governed by rules of court made under the authority of the Judicature Acts, but a judge in any division has power to retain any case brought before him or to transfer it to the proper division. "The work of the Chancery Division consists chiefly of the hearing of matters in equity; it, however, administers law as well as equity, but it hears no cases with a jury. It deals with the administration of the estates of deceased persons, partnership matters, mortgages, charitable and private trusts, infants, and other heads of equitable jurisdiction. It also (since 1921) hears appeals in bankruptcy from the County Courts. The jurisdiction of the King's Bench Division in civil matters is almost entirely appellate over local or inferior courts. On the crown side, it deals with indictments and criminal informations, and in civil proceedings with mandamus, habeas corpus, certiorari, prohibitions, informations in the nature of quo warranto, attachments for contempt of court, and petitions of right. The Probate, Divorce, and Admiralty Division deals with the probate of wills and matters of divorce, but the interpretation of wills and the administration of estates go to the Chancery Division. In admiralty matters it hears appeals from the County Courts."[21]

The Court of Criminal Appeal

The Criminal Appeal Act of 1907, established a Court of Criminal Appeal consisting of the Lord Chief Justice and eight of the

[20] Bowman, pp. 228, 229.

[21] Bowman, p. 228.

judges of the King's Bench Division of whom any three or larger uneven number constitute a quorum. "The court has appellate jurisdiction of all criminal cases tried in the King's Bench Division, the Central Criminal Court, and other criminal courts. It may re-examine questions of law or fact, or mixed questions of law and fact, and has power to affirm or quash convictions and to modify sentences, making them either less or greater, so as to conform to law. It has no power to grant a new trial. From its decision an appeal may be taken to the House of Lords, but only upon a certificate of the Attorney General that the question involved is one of great public importance."[22]

Courts of Final Appeal

"It was one of the original purposes of the Judicature Act of 1873 to abolish the appellate jurisdiction of the House of Lords and the Judicial Committee of the Privy Council, but the provisions looking to this end were repealed before they had taken effect. The respective jurisdictions of these courts as ultimate courts of appeal therefore remain. The House of Lords (as a court) consists of any three or more of the following: the Lord Chancellor, six Lords of Appeal in Ordinary, and peers who are holding, or have held, high judicial office. The judges of the Judicial Committee are nominally members of the Privy Council, but the greater part of the work of the committee is in fact done by persons eligible to hear appeals in the House of Lords, so that the two final courts of appeal, though theoretically distinct, tend to become identical in membership."[23]

UNITED STATES COURTS

101. The principal courts of the United States judiciary are:
(a) The Supreme Court of the United States,
(b) The United States District Courts, and
(c) The United States Courts of Appeals.

Organization of the Federal Judiciary

The Constitution of the United States[24] provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

[22] Bowman, p. 229.

[23] Bowman, pp. 230, 231.

[24] Art. 3, § 1, § 2, cl. 1, U.S.C.A. Const.

Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Congress, pursuant to the power thus conferred, enacted certain legislation on September 24, 1789, now commonly referred to as the "Judiciary Act of 1789" by which the Supreme Court was organized and a system of inferior courts established, and this system of inferior courts, with some modifications, still exists. "By this act the eleven States then in the Union were divided into thirteen districts, and the districts grouped so as to form three circuits; and in each district was created a United States District Court, and in each circuit a United States Circuit Court, which sat in each district of the circuit in rotation."[25] Of course, with the admission of new states into the Union and with the increase in population of the states, new districts and circuits have been created, but no district crosses a state line so as to include the territory of different states or parts of different states. At the present time there are ten circuits none of which contains less than three states, and the largest, the Ninth Circuit, embraces seven states. On the other hand, there is a single district in about one-half of the states, two districts in about one-third of the states, and in a few of the states there are three federal judicial districts.

The Supreme Court, the District Courts, and the Circuit Courts of Appeals are the courts in which Congress has established the judicial power of the United States granted by the third article of the Constitution. "These may therefore be said to be courts of the regular judicial system. All other courts and tribunals

[25] Bowman, p. 231.

For statutes dealing in general with the District Courts, see 28 U.S.C.A. §§ 1–196; and for statutes dealing in general with the Circuit Courts of Appeals, see 28 U.S.C.A. §§ 211–231.

are special. They have been created, not in virtue of the judicial power of the United States, but under various other powers given by the constitution to Congress. Constitutional requirements affecting the regular courts, for example, the life tenure of judges, do not necessarily apply to these special tribunals."[26]

The Supreme Court

The Supreme Court consists of a Chief Justice and eight Associate Justices, any six of whom constitute a quorum.[27] Concerning its jurisdiction the Constitution[28] provides, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make." As the Supreme Court is the court of last resort in matters of federal law, for cases adjudicated in either the inferior federal courts or the courts of last resort in the several states, and in matters of state law for cases adjudicated in the inferior federal courts, its appellate jurisdiction is invoked much more than is its original jurisdiction. "Each member of the court, in addition to his duties on the bench of the Supreme Court, is allotted by order of the court to one or two of the ten circuits, and is by law competent to preside in the Circuit Court of Appeals of the circuit to which he is assigned, but is not now required, as formerly, to do so. In this capacity he is called the 'Circuit Justice' of the circuit, as distinguished from the 'Circuit Judges' therein. In practice, however, the justices do not now serve in this capacity, their duties at Washington occupying their entire time."[29]

The District Courts

A District Court is organized in each of the federal judicial districts in which the country is divided, and most of these courts have one or two judges although some have more. Each judge holds trials and exercises the full authority of the District Court. Approximately two-thirds of the districts are separated into "di-

[26] Bowman, p. 231.

[27] R.S. § 673, 28 U.S.C.A. § 321.

[28] Art. 3, § 2, cl. 2, U.S.C.A.Const. For the "other Cases before mentioned," see Art. 3, § 2, quoted above.

[29] Bowman, pp. 231, 232. And see, 28 U.S.C.A. §§ 215–217. For statutes treating in general of the jurisdiction and business of the Supreme Court, see 28 U.S.C.A. §§ 321–354.

visions" which are virtually subdistricts. "The District Courts are the general courts of original jurisdiction, or trial courts, of the federal judicial system. They have original jurisdiction of civil cases at common law, in equity, in admiralty, in the enforcement of acts of Congress, and of all prosecutions for crime cognizable under the authority of the United States."[30]

The Circuit Courts of Appeals

The Circuit Courts of Appeals were established as United States courts of intermediate appeal by the Circuit Courts of Appeals Act of 1891,[31] for the purpose of relieving the Supreme Court the business of which had increased to such proportions that the court could no longer dispose of it. The act created nine Circuit Courts of Appeals, one for each circuit as then existing, with appellate jurisdiction over the District Courts and other federal courts within the particular district, but by the Act of February 28, 1929, c. 363,[32] the number of circuits was increased to ten. Most of the circuits have three Circuit Judges, but a few have more. "A sitting Circuit Court of Appeals consists of three judges, of whom two constitute a quorum. These judges may be any three (or two) of the following: The member of the Supreme Court assigned to the particular circuit, the Circuit Judges of the Circuit, and any of the District Judges therein who may be assigned to that duty; but no judge may sit in any case in which there is to be reviewed any order or decision made by him in the court below."[33] The jurisdiction of the Circuit Courts of Appeals is exclusively appellate; they have no original jurisdiction. "Their jurisdiction, which was greatly enlarged by the Judiciary Act of 1925 (28 U.S.C.A. § 225 et seq.), to relieve the increasing burdens of the Supreme Court, extends, with certain specified qualifications and exceptions, to the decisions of the District Courts, both within the United States proper and in the territories, the United States Court for China, and the Supreme Courts of Hawaii and of Porto [Puerto] Rico. In designated instances, a Circuit Court of Appeals reviews the decisions of boards and commissions, such as the Federal Trade Commission, the Federal Reserve Board, [now the Board of Governors of the Federal Reserve System], the Interstate Commerce Commission, and the Board of Tax Appeals."[34] The Circuit Courts of

30 Bowman, p. 232.

31 26 Stat. 826.

32 45 Stat. 1346, amended, 28 U.S. C.A. § 211.

33 Bowman, p. 233, and see, 28 U.S. C.A. § 216.

34 Bowman, p. 233.

Appeals have no jurisdiction to review the decisions of the courts of the states and cases from the highest state courts go directly to the federal Supreme Court. "In all cases, civil or criminal, the judges of a Circuit Court of Appeals may certify questions of law to the Supreme Court of the United States, whereupon that court, at its discretion, may either answer such questions or require that the whole case be sent up for its consideration. In cases where a Circuit Court of Appeals has held a state statute invalid on the ground that it is repugnant to the Constitution or a law or treaty of the United States, the losing party may take an appeal to the Supreme Court. In all other cases, the decision of a Circuit Court of Appeals is final, except as it may be reviewed upon writ of certiorari by the Supreme Court, at the discretion of that court."[35]

SPECIAL UNITED STATES COURTS, COMMISSIONS, AND BOARDS

United States Customs Court

The Board of United States General Appraisers, (which was already virtually a court), was given the title of United States Customs Court by the Act of May 28, 1926,[36] with jurisdiction of cases arising under the Tariff Act, such as the classification of merchandise for tariff purposes, the rates of duty to be imposed, and the fees and charges connected therewith. For such cases its rank is similar to that of a District Court.

35 Bowman, p. 234.

The Circuit Courts of Appeals are distinct from the former Circuit Courts which had an existence of more than one hundred twenty years. From 1789 to 1891, (with one short interruption), the jurisdiction of the Circuit Courts was partly original, and partly appellate over the District Courts, but by the Circuit Courts of Appeals Act of 1891, 26 Stat. 826, their appellate jurisdiction was taken away and for twenty years thereafter they were courts of first instance only. They were abolished by the Judicial Code of 1911, 28 U.S.C.A. § 1 et seq., and their jurisdiction transferred to the District Courts. "The decisions of these courts dealt with the more important kinds of cases which came before the federal courts during the formative period of our law, the opinions in many cases being written by the Supreme Court justice on circuit. These decisions are, of course, still authoritative, except as they may have been modified on appeal or by later decisions or acts of Congress." Bowman, p. 232.

36 44 Stat. 669, 19 U.S.C.A. § 405a. See, now, Act of June 17, 1930, c. 497, Title 4, § 518, 46 Stat. 737, 19 U.S.C. A. § 1518.

The Court of Customs and Patent Appeals

The Court of Customs and Patent Appeals was established by the Tariff Act of August 5, 1909,[37] as the United States Court of Customs Appeals, but its name was changed to the United States Court of Customs and Patent Appeals by the Act of March 2, 1929, c. 488.[38] It has jurisdiction of appeals from the United States Customs Court and from the Patent Office in patent and trade-mark cases, and its decisions in most cases are final. However, in cases involving the construction of the Constitution or treaties of the United States its determinations may be reviewed by the Supreme Court.

The Former Commerce Court

The United States Commerce Court was created by the Commerce Court Act of June 18, 1910,[39] with jurisdiction to enforce, enjoin, set aside, annul and suspend any order of the Interstate Commerce Commission. It was abolished in 1913, and its jurisdiction transferred to the United States District Courts.[40]

The Court of Claims

The Court of Claims was originally created in 1855, "as a special tribunal or auditing board, with power to investigate claims against the government, report its findings to Congress, and, in case of claims approved by Congress, to draft legislative bills for their payment. By subsequent acts of Congress it has been made into a court of special jurisdiction. The present Court of Claims is authorized to hear and determine (1) all claims (except pensions and civil war claims) against the United States founded on any act of Congress, on any regulation of an executive department, on any contract express or implied with the government, or for damages, in cases not sounding in tort, in respect to which the party would be entitled to redress if the United States were suable; (2) all counter demands of the government against any claimant; (3) claims of disbursing officers of the government for relief from responsibility for loss while in the line of duty; (4)

37 36 Stat. 91, 105, Jud.Code, § 188, 28 U.S.C.A. § 301.

38 45 Stat. 1475, 28 U.S.C.A. § 301, note. For other statutes treating generally of the United States Court of Customs and Patent Appeals, see 28 U.S.C.A. §§ 302–312.

39 36 Stat. 539, Jud.Code, §§ 200–214, now repealed, 28 U.S.C.A. §§ 41 (27) note, 45, 46, 48, 214.

40 Act of Oct. 22, 1913, c. 32, 38 Stat. 219; Jud. Code, § 24(27, 28), as amended, see 28 U.S.C.A. § 41 (27, 28).

questions of fact or law submitted by heads of departments for their guidance or to obtain an adjudication."[41]

Military Courts

The military courts of the United States are created, not under the judicial power conferred upon Congress by article three of the Constitution, but under the military power of the United States; the power of Congress to "declare war," and to "make rules for the government of the land and naval forces."[42] Such courts are of three main kinds: (a) military commissions; (b) provost courts; and, (c) courts-martial. "Military commissions and provost courts function only in territory under military government or martial law, and to the extent that is found necessary control the entire administration of justice. Courts-martial have jurisdiction over the members of the land and naval forces, and, in time of war, over civilians. There are also military courts known as courts of inquiry, provisional courts, and deck courts."[43]

The United States Senate

The Constitution of the United States[44] provides: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." There is no appeal from the decision of the Senate in a federal impeachment trial.

41 Bowman, p. 235. For statutes treating in general of the Court of Claims, see 28 U.S.C.A. §§ 241–293.

42 U.S.C.A.Const. art. 1, § 8, cls. 11, 14.

43 Bowman, pp. 236, 237. For army courts and their jurisdiction, see the Articles of War (4–16), 10 U.S.C.A. §§ 1475–1487; and, for courts of the navy, see the Articles for the Government of the Navy (26–64), 34 U.S.C.A. § 1200.

44 Art. 1, § 3, cls. 6, 7, U.S.C.A. Const.

Miscellaneous

In addition to the "special" federal courts discussed, other special tribunals which are not parts of the regular judicial system of the United States but which exist and function by reason of the authority of the federal government, include: (a) the Courts of the District of Columbia; (b) the Courts of the Territories; (c) the Consular Courts;[45] (d) the United States Court for China;[46] and, (e) the various executive and legislative agencies of the federal government which exercise judicial authority, such as the Interstate Commerce Commission and the Board of Tax Appeals; the so-called "quasi-judicial" tribunals.

STATE COURTS

102. The judicial systems and courts of the several States are generally similar, but differ in detail.

In general

As a rule the courts of a state consist of the following: (a) A court of final appeal; (b) One or more courts of intermediate appeal, in some states; (c) Local courts of original jurisdiction in common-law, equity, criminal, and probate cases, or some combination of two or more of these; and, (d) Local courts of original jurisdiction in small cases, either civil or criminal, or both. "In every state there is a court of last resort, whose decisions are final in matters of state law not involving the Constitution, laws, or treaties of the United States. This court is in most states called the 'Supreme Court,' but in some it is known as the 'Court of Appeals.' In about one-third of the states there are courts of intermediate appeal, the decisions of which are in certain cases final, and in others reviewable by the court of last resort. Courts of general original jurisdiction sit for the trial of causes at the county seats of the different counties, and in some instances at other places in the county designated by law, and are variously called 'circuit courts,' 'district courts,' 'superior courts,' or 'courts of common pleas.' Courts of special probate jurisdiction are usually styled 'probate courts,' but in Pennsylvania such a court is called the 'orphans' court,' and in New York the 'surrogate's court.' In a number of the Western States

[45] For statutes treating generally of the Consular Courts, see 22 U.S.C.A. §§ 141–183.

[46] For statutes treating generally of the United States Court for China, see 22 U.S.C.A. §§ 191–202.

courts having probate and other jurisdiction are called 'county courts.' Small cause courts are known as 'justice of the peace courts,' 'police courts,' or 'municipal courts.' "[47] For the details as to the organization of the judiciary and courts in any state, the statutes of the state must be consulted.

[47] Bowman, p. 238.

CHAPTER 23

PROCEDURE

IN GENERAL

103. Legal procedures are the methods by which legal remedies are obtained and enforced.

When a legally protected interest is so threatened or infringed that the subject or owner of the primary legal right which protects such interest is entitled to a legal remedy, in order to obtain or realize the remedy, he must proceed according to the case as the law requires. Hence, a procedure is the mode by which a legal remedy is realized, the method by which a legal remedy is obtained and applied; and what the proper procedure is in a particular case will depend upon the kind of interest and primary right that is involved and the kind of remedy that is desired, needed, or available.

Courts do not initiate actions or suits, and until properly applied to a court will not attempt to decide a controversy. It is only by proceeding as the law requires that a plaintiff may get his case into court and a judgment or decree rendered and enforced. The other party and the court must be notified of the cause, jurisdiction shown, and the issues presented. Then a trial must be had at which the evidence of the parties is heard, their rights and the facts determined, and the law applied thereto. This is procedure; the way by which the judicial process is made to function in a particular case.

The most important forms of procedure to a student of the Anglo-American legal system are: (a) common-law procedure; (b) equity procedure; (c) code procedure; and, (d) criminal procedure. These are discussed in the following sections.

COMMON-LAW ACTIONS

104. A proceeding in a common-law court is called an "action."

At common-law there were and are various "forms" of action, the propriety of the form in a particular case being dependent upon the kind of primary right involved and the kind of remedy applicable. "The question whether a man can bring this or that action, trespass, trover, assumpsit, etc., is the way the question of liability and substantive right presents itself. There ought indeed to be a remedy for every wrong (ubi jus, ibi remedium), yet the right of action at common law depends upon whether the case fits anywhere in a limited and arbitrary list of writs, within the scope and theory of which the facts may be brought. There are only so many rights of action, as there are forms of action. This system of forms of action persisted in actual use in English procedure for six centuries, from the time of Henry II and Edward I until the Judicature Acts (in force in 1875). * * * The essential differences were in the allegations of fact necessary to show the right of action in each form; in other words, in their respective grounds and theories of liability. Some cases may fall under two or three of these theories, and the litigant will have a choice or election between them." [1]

THE EARLY CLASSIFICATION OF COMMON-LAW ACTIONS

(1) Real Actions

The forms of action anciently in use were of three classes: (a) real; (b) personal; and, (c) mixed. Real actions were actions for the specific recovery of a freehold or an incorporeal hereditament brought by a claimant out of possession against a tenant in possession, and most of them fell within the following classes: (1) Proprietary actions, (writs of right, and writs in the nature of writs of right); and, (2) Possessory actions, (writs of assize, and writs of entry).

The proprietary actions were those brought to determine the title or ownership of a freehold as between the contending litigants, the demandant founding his action upon a claim of "better right" of property therein than that of the tenant. "Origin-

[1] Shipman on Common-Law Pleading, 3d Ed., (hereinafter cited "Shipman"), pp. 54, 55.

ally such actions were used in the manorial courts for the trial of rights of property in the manor, but by the time of Edward I they had become transferred almost wholly to the king's court. They were triable by battle or, at the option of the tenant, by the grand assize. Being the oldest of the real actions, their procedure was the most archaic, and in course of time they became almost unbelievably technical, cumbersome, and dilatory. They were of two kinds: (1) Writs of right, for the recovery of a fee simple estate in land; (2) writs in the nature of writs of right, for the recovery of a fee tail or a life estate in land or an incorporeal hereditament." [2]

The possessory actions were those brought to recover the possession (seisin) of a freehold interest in land without litigating the question of better right or title. "For reasons of public policy, and particularly for the purpose of discouraging violent self-help by owners out of possession, or by those who professed to be such owners, these actions protected quiet and peaceable possession of a freehold, irrespective of the means by which it had been acquired." [3] The possessory actions were of two kinds: (1) writs of assize; [4] and, (2) writs of entry.[5]

(2) Personal Actions

Personal actions were those brought to recover a debt, damages, or the possession of a personal chattel, and were classified

[2] Bowman, p. 240.

[3] Bowman, p. 242.

[4] "The writs of assize were a small group of actions, five in number, created by the reforms of Henry II. They were triable by the petty assize or, if the parties so agreed, by jury. Because of this and their more summary procedure, they were so manipulated by practitioners that they largely displaced most of the proprietary actions." Bowman, p. 242.

[5] "The writs of entry were a very large collection of actions, numbering more than a score of varieties and hundreds of subvarieties in the register of writs, which were developed in analogy to the writs of assize mainly during the century following the reign of Henry II. Like the writs of assize, they litigated only the question of priority of possession and not the ultimate right or title. They were triable by jury, and almost completely superseded the proprietary actions and the writs of assize. For more than three centuries the learning which centered around them was the fullest and most important part of the common law. During these centuries nearly the whole of the early law of real property was laid down by the judges with these writs as its basis, and hence in terms of possession rather than ownership.

"Writs of entry in a greatly modified form are still used in some of the New England states. Elsewhere they have been displaced by the action of ejectment or by statutory actions for the recovery of realty." Bowman, pp. 242, 243.

as follows: (1) Actions ex delicto,—(a) trespass, (b) case, (c) trover, (d) detinue, (e) replevin; and, (2) Actions ex contractu,—(a) debt, (b) account, (c) covenant, (d) special assumpsit, (e) general assumpsit. The nature and scope of these actions is determined largely by the meaning of the three terms "debt," "damages," and "personal chattel." A "debt" is a definite sum of money owed and which arises from any cause of indebtedness, contractual or noncontractual, recognized in law as a source of obligation, its distinctive feature, as distinguished from a claim for uncertain damages, being that it is a fixed and certain sum and that no future adjudication is necessary to determine the amount. "Damages," on the other hand, constitute the monetary recompense or indemnity recoverable by a person who has sustained an actionable injury to his interests of personality, property, or relations from the act or default of another. Damages differ from a debt in that they are recompense for a harm and are not definite in amount. However, it is possible for the parties of a contract to agree in advance upon a stipulated sum to be paid as damages in case of a breach, and such damages if upheld by the court are called "liquidated damages." "Personal chattels," include things which are movable.

The actions of trespass, detinue, replevin, debt, account and covenant "were in use before the enactment of the Statute of Westminster II. Subsequently, case branched off from trespass; trover and special assumpsit branched off from case; while general assumpsit was derived from debt and special assumpsit. Covenant was originally an action to recover damages, but in late times could be brought to recover a debt and became substantially two actions. Debt-detinue was originally a single action which became separated into two. * * * The fundamental rule governing the use of these actions, before modern statutory modifications, was that the plaintiff must select the form that fit the facts of his case. The choice of the wrong form was fatal to his action. If, for example, he sued in trespass, and the evidence at the trial showed that he should have sued in trover, his action was dismissed and he had to pay the costs of the action mistakenly brought before he was permitted to sue in the proper form. In many cases, however, two or more forms were 'concurrent' for the same state of facts; that is, a plaintiff could bring either as he might prefer. But this choice of remedies was also governed by exceedingly technical rules, and, having made his choice, the plaintiff had to abide the result or dismiss his action and start again if he discovered during the progress of the proceeding that

another allowable form would have been more to his advantage." [6]

(3) Mixed Actions

Mixed actions were those brought to recover possession of a freehold and damages for the wrong done. "These actions were never numerous or important. All of them seem to have been possessory actions, to which Parliament added a money penalty. They have long been obsolete. The action of ejectment, which arose at a later time, has been called a mixed action, but it has little resemblance to the ancient mixed actions." [7]

THE MODERN CLASSIFICATION OF COMMON-LAW ACTIONS

The forms of common-law actions in modern use may be classified in respect to the relief obtainable as follows: (1) Actions to recover damages,—(a) trespass, (b) case, (c) trover, (d) covenant, (e) special assumpsit; (2) Actions to recover a debt, —(a) debt, (b) account, (c) covenant, (d) general assumpsit; (3) Actions to recover the possession of a personal chattel,—(a) detinue, (b) replevin; and, (4) Actions to recover the possession of land,—(a) ejectment. However, "this classification is not rigidly accurate. Actions designed primarily for the recovery of damages may in some cases be used to recover a debt; those for the recovery of possession may result in the recovery of incidental damages. But the classification does express, so far as the nature of the actions permits, their prime purpose and general use." [8]

ACTIONS TO RECOVER DAMAGES

(1) Trespass

The action of trespass lies for the recovery of damages for an injury to the person, property, or relative rights of another, "(a) Where the injury was committed with force, actual or implied. (b) Where the injury was immediate, and not merely consequential. (c) In case of injury to property, where the property was in the actual or constructive possession of the plaintiff at the time of the injury." [9] Where the injury complained of is an entry up-

[6] Bowman, pp. 245, 246.

[7] Bowman, p. 244.

[8] Bowman, pp. 248, 249.

[9] Shipman, § 35, p. 66.

on real property the action is called "trespass quare clausum fregit"; where the injury is that of taking and carrying away personal property it is called "trespass de bonis asportatis." All trespasses, whether committed with actual or implied force, are called trespass "vi et armis."

(2) Case

An action on the case lies to recover damages, "(a) For torts not committed by force, actual or implied. (b) For torts committed by force, actual or implied, where—(1) The injury was not immediate, but consequential; (2) The subject-matter affected was not tangible; or (3) The interest in the property affected did not give the right of possession. Case is a kind of residuary action covering non-violent wrongs. Trespass and case are supplementary in the field of tort. In general, case lies where no other form or theory of action is available, though it is sometimes concurrent with other forms. Actions on the case were allowed under the Statute of Westminster II in cases similar to those covered by the established theories or forms of action." [10]

(3) Trover

The action of trover or trover and conversion lies to recover damages for the conversion by the defendant to his own use of specific personal property of which the plaintiff was entitled to the immediate possession. "The object of the action is the recovery of the value of the property as damages for its conversion, and not the recovery of the property itself." [11]

(4) Covenant

The action of covenant lies "for the recovery of damages for breach of a covenant, that is, a promise under seal, whether the damages are liquidated or unliquidated. When the damages are unliquidated it is the only proper form of action." [12]

(5) Special Assumpsit

The action of special assumpsit lies, "(a) To recover damages for the breach of an informal contract, either express or implied in fact. (b) To enforce a quasi contractual obligation for the payment of money, as in the case of an implied warranty of the

[10] Shipman, § 38, p. 83.

[11] Shipman, § 42, p. 98.

[12] Shipman, § 55, p. 141.

title of goods sold. (c) To recover damages for the breach of a relational duty, as in the case of carrier and shipper, carrier and passenger, innkeeper and guest, and many others." [13]

ACTIONS TO RECOVER A DEBT

(1) Debt

The action of debt lies "where the party claims the recovery of a debt; that is, a liquidated or certain sum of money due him. The action is based upon contract, but the contract may be implied, either in fact or in law, as well as express; and it may be either a simple contract or a specialty. The most common instances of its use are for debts: (a) Upon unilateral contracts express or implied in fact. (b) Upon quasi contractual obligations having the force and effect of simple contracts. (c) Upon bonds and covenants under seal. (d) Upon judgments or obligations of record. (e) Upon obligations imposed by statute. The action will not lie: (a) To recover unliquidated damages for breach of a promise. (b) Nor, generally, to recover an installment of a debt payable in installments before the whole is due. (c) Nor on a promise to pay out of a particular fund, or in a particular kind of money, or in property or services." [14]

(2) Account

The action of account lies where one has received goods or money for another in a fiduciary capacity, to ascertain and recover the balance due. "It can only be maintained where there is such a relationship between the parties, as to raise an obligation to account, and where the amount due is uncertain and unliquidated." [15] When the amount due is ascertained, it is recovered as a debt.[16]

(3) Covenant

Covenant, as an action for debt, lies to recover a debt evidenced by a sealed promise or a sealed acknowledgment of indebtedness from which a promise may be implied. "The action of covenant, * * * [also] lies to recover damages for the breach of a contract under seal. But for centuries it could not be used to enforce a contract under seal for the payment of money. In such cases debt was the exclusive remedy. Later covenant became concurrent with debt in all cases where the deed or specialty contained an express promise to pay, or where a promise could be implied from the terms used." [17]

[13] Bowman, § 130, p. 257.

[14] Shipman, § 52, p. 132.

[15] Shipman, § 56, p. 144.

[16] See Bowman, § 132, pp. 264, 265.

(4) General Assumpsit

The action of general assumpsit lies to enforce obligations to pay money arising from: "(a) Informal contract debts. (b) Quasi contracts. (c) Liabilities imposed by statute. (d) Judgments of foreign courts and of domestic courts not of record." [18] On the other hand, "general assumpsit will not lie where there has been an express contract, except: (a) Where the contract, or some divisible part thereof, has been fully executed by the plaintiff, and nothing remains but the payment of money by the defendant. (b) Where, after part performance of the contract by the plaintiff, further performance is prevented by an act of the defendant, or by some act or event which in law operates as a discharge of the contract, or if the contract is abandoned or rescinded. (c) In a few states there can be a recovery in general assumpsit for a part performance of an entire contract benefiting the defendant, if the plaintiff acted in good faith. (d) If the special contract is merely void (not illegal), or merely unenforceable, or voidable and has been avoided, there may be a recovery in general assumpsit for part performance. (e) General assumpsit [also] lies for additional work done on request in performing a special contract." [19]

ACTIONS TO RECOVER POSSESSION OF CHATTEL

(1) Detinue

The action of detinue lies where it is sought to recover, not damages for the taking or detention of a personal chattel, but the chattel itself, with damages for its detention. "The judgment awards either recovery of the chattel itself, or its value, with damages for its detention. To maintain the action—(a) The chattel must be specific and capable of identification. (b) The plaintiff must have either a general or special property in the chattel, or the right to immediate possession. (c) The defendant must be in the actual possession of the chattel at the time of commencing suit." [20]

[17] Bowman, § 133, pp. 265, 266.

[18] Bowman, § 134, p. 266.

[19] Shipman, § 60, p. 153.

[20] Shipman, § 46, p. 114.

(2) Replevin

The action of replevin lies where specific personal property has been wrongfully taken and is wrongfully detained, to recover possession of the property, together with damages for its detention. "To support the action it is necessary: (a) That the property shall be personal. (b) That the plaintiff, at the time of suit, shall be entitled to the immediate possession. (c) That (at common law) the defendant shall have wrongfully taken the property (replevin in the cepit). But, by statute in most states, the action will now also lie where the property is wrongfully detained, though it was lawfully obtained in the first instance (replevin in the detinet). (d) That the property shall be wrongfully detained by the defendant at the time of suit." [21]

ACTION TO RECOVER POSSESSION OF LAND

(1) Ejectment

The action of ejectment lies to recover possession of real property adversely held by the defendant. "In order that the action may be maintained: (a) The plaintiff must have the right to possession at the time the action is commenced. (b) The plaintiff must have been ousted or dispossessed. (c) And the defendant must be in the adverse and illegal possession of the land, actual or constructive, at the time the action is brought. In the absence of a statutory provision to the contrary, merely nominal damages are given for the dispossession in the action of ejectment proper. The mesne profits, etc., during the defendant's possession must be recovered in a separate action of trespass, called an action of trespass for mesne profits, brought after the recovery in ejectment, or by some similar remedy. In many jurisdictions, by statute, mesne profits and other damages may be, and in some must be, recovered in the action of ejectment proper." [22]

[21] Shipman, § 49, p. 120.

[22] Shipman, § 64, p. 173.

COMMON-LAW PROCEDURE

105. Common-law procedure is that which obtains in actions at common law, as distinguished from suits in equity, code actions, and criminal proceedings.

Commencement of Action

An action, in early courts of common law, was commenced by original writ which not only gave the court jurisdiction of the subject-matter but enjoined upon the sheriff the duty of compelling the defendant to appear. "The original writ was a mandatory letter or executive order from the king to his officer, the sheriff, to compel the defendant to appear in court to answer the demand of the plaintiff. This was the foundation of judicial process; that is, of writs issued in the name of the court, under its seal, by executive or ministerial officers of the court. * * * In modern practice the original writ is no longer used either as authority for instituting the suit, or for the purpose of compelling appearance of the defendant, though in some of our states the term is retained to designate the process that has taken its place. No writ at all is necessary as authority for instituting suits, and the writ of summons is used as a means of notifying the defendant of the suit, and ordering him to appear in court. The practice is very generally, if not entirely, regulated by statutes, varying somewhat in the different states. The general practice is for the attorney, in commencing an action, to draw up, sign, and present to the clerk of the court, an order requesting him to issue the summons. This order is called a praecipe. It is never essential to the validity of the summons, but is used merely as a convenient way of directing the clerk as to its issuance. A verbal direction would do as well." [23]

Appearance of Defendant

The "appearance" of the defendant may consist of any act or proceeding by which he places himself before the court in order to participate in the action, and his appearance may be "general" or "special." Thus, "if the defendant or his attorney does any act with reference to the defense of the action, he is held to submit himself to the authority of the court and all defects in service of process are thereby cured. Such is a general appearance. The

[23] Shipman, pp. 17–19. As to how the summons is served and jurisdiction acquired, see supra, § 96, "Elements of jurisdiction."

defendant may, however, make a special appearance simply to raise objections to the validity of the service of process or to challenge the jurisdiction of the subject-matter." [24]

The Pleadings

"On the appearance of the parties, the pleadings commence. The various pleadings and their order are as follows: (a) The declaration of the plaintiff. (b) The dilatory pleas of the defendant. (c) The demurrer or plea of the defendant. (d) The demurrer or replication of the plaintiff. (e) The demurrer or rejoinder of the defendant. (f) The demurrer or surrejoinder of the plaintiff. (g) The demurrer or rebutter of the defendant. (h) The demurrer or surrebutter of the plaintiff. * * * The pleadings were formerly delivered orally, and in open court; but this practice has long since ceased. The modern practice is to draw up written pleadings in typewritten form, and file them in the office of the proper officer of the court, usually the clerk's office. Here the opposite party may examine a pleading, or he may procure a copy from the officer; or it may be that under the statutes of the particular state, or a rule of the court, a copy may be required to be delivered to him. When the pleadings are thus filed they become a part of the record of the cause. They are not, as formerly, transcribed, but are themselves properly indorsed and kept on file as a part of the record." [25]

Plaintiff's Declaration

The first pleading in an action at common law is the plaintiff's declaration which consists of a statement in legal form of the grounds of the plaintiff's right of action. It is analogous to the bill of complaint in equity suits and the complaint in code procedure, and must fully show, "the right of action in the plaintiff at the time of bringing the suit, and will be insufficient to warrant judgment in his favor if it fails in this, for he can recover only on the grounds which the declaration sets forth." [26]

The Demurrer

If, admitting the truth of all the facts therein set forth, the plaintiff's declaration is on its face insufficient in law to show a right of action or is defective in form, the defendant may so assert by a pleading called the "demurrer." A demurrer will also

[24] Shipman, p. 24.
[25] Shipman, pp. 25–27.
[26] Shipman, p. 27.

lie by the plaintiff to the pleadings of the defendant, or by the defendant to pleadings of the plaintiff, subsequent to the declaration, for insufficiency in substance or in form.

The Dilatory Pleas

If the declaration of the plaintiff is not open to a demurrer or the defendant does not choose to avail himself of such pleading, he must plead; that is, answer the declaration by matter of fact. Pleas are either (a) dilatory; or, (b) peremptory, in bar of the action. "Dilatory pleas are to the jurisdiction of the court, alleging that it has no cognizance of the subject-matter; to the disability of the plaintiff, by reason of which he is incapable to commence or continue the suit, as that he is an infant; misnomer, for misnaming the defendant; or the death of either party, which is an abatement of the suit, though it may be continued in most cases in the name of the administrator or executor. Other dilatory pleas take exception to misjoinder of causes of action, or the misjoinder or nonjoinder of parties, in that the suit is wrongly brought as against them, or that there is a defect of necessary parties. * * * These pleas had at common law to be pleaded in due order, one at a time, and the court would decide whether the defendant ought to be compelled to proceed further, until the objections were removed; if all were overruled, it was then incumbent on the defendant to plead and answer over to the merits of the case, which was called a plea in bar." [27]

Pleas in Bar

A plea in bar is one which shows some ground for barring or defeating the action on its merits and contains a prayer to that effect. Hence it is called a "peremptory" plea because it is a positive answer to the declaration, and a plea "to the merits" because it waives all the irregularities and informalities and puts the contest upon the merits of the case. "It follows from the nature and object of the plea in bar that it must generally deny all or some essential part of the averments of fact in the declaration, or, admitting them to be true, allege new facts which obviate or repel their legal effect. In the first case, the defendant is said to traverse the matter of the declaration; in the latter, to confess and avoid it. Pleas in bar are consequently divided into pleas by way of traverse and pleas by way of confession and avoidance." [28]

[27] Shipman, p. 29.
[28] Shipman, p. 30.

The Replication, Subsequent Pleadings, and Production of Issues

The replication is the answer of the plaintiff to the plea of the defendant, and the pleadings subsequent to the replication are the rejoinder and rebutter of the defendant and the surrejoinder and surrebutter of the plaintiff. After the surrebutter the pleadings have no distinctive names because an issue is ordinarily produced prior thereto and consequently pleadings are seldom found to extend beyond that stage.

An "issue" in pleading is a specific point of controversy affirmed on the one side and denied on the other, and may be either of law or of fact. "The reduction of the controversy to some specific question is the object of all [common-law] pleading, and, when reached, it is called the 'issue'; and the cause, when at issue, is ready for trial or for the decision of the issue raised. A demurrer, either by the defendant to the declaration or other pleading of the plaintiff, or by the plaintiff to a plea or other pleading of the defendant, being a denial of the legal sufficiency of the pleading, raises at once a question of law which it is always the peculiar province of the court to determine without the aid of a jury. This question must be decided before further proceedings are had, and it is therefore said that the demurrer always tenders an issue in law. Again, if the declaration or other pleading is sufficient on its face, and no demurrer is interposed, the pleadings, whether of the defendant or the plaintiff, stating matters of fact, must at length reach a point where the opposing party will simply traverse or deny what is alleged, and this traverse must always tender an issue, which is one of fact, and which the formal words of the traverse refer to a trial by jury, by concluding 'to the country.' * * * When the pleadings are all in, and issues joined then by comparison of what is affirmed on each side and admitted or denied on the other, counsel may ascertain what points are agreed and what are contested which must be established as true by the presentation of evidence. Each side may accordingly map out its case, collect its evidence, and prepare for trial. If the pleadings have performed their function, they have narrowed the case to the exact points of dispute which the parties are to maintain and prove, the decision of which disposes of the case, and upon which the final conclusion of law depends. * * * It is the office of pleading, as preparatory to the trial: (1) To give fair notice to the other side of the facts relied on and intended to be proved, and place them on record; (2) to separate the law from the facts, and to lay aside all extraneous, admitted, waived, and

granted matter, leaving the essential grounds of contention bare; (3) to apportion the propositions of claim and defense, and thereby determine the burden of proof as to the various issues,—i. e. what facts are essential to the cause of action, which the plaintiff must prove to make out his case, and what the defendant must prove to relieve himself from this prima facie cause of action."[29]

Method of Trial of the Issues

Issues of law are generally decided by the judge without a jury after argument by counsel for the respective parties; whereas the decision of an issue of fact in an action at common law is usually by trial before the judge and a jury which terminates upon verdict and judgment.[30]

The Verdict

A verdict is the formal decision or finding made by a jury upon the matters or questions in trial and which are duly submitted to it, and such verdict is either "general" or "special." "By a general verdict the jury report to the court in a general way that they have found a decision for the plaintiff or the defendant; and, if for the plaintiff, they assess the amount of damages sustained by him in consequence of the injury for which the action is brought. In a special verdict the jury state the naked facts of the case, as they find them to be proved, concluding conditionally that, if upon the whole matter the court should be of opinion that the plaintiff has cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This leaves it to the court to apply the law to the facts. * * * In a general verdict the jury must apply the law under the instructions of the presiding judge. * * * It was entirely optional with the jury at common law to find generally or specially, even in the face of a request or demand for special findings on particular points by court or counsel. Under statutory provisions, however, special questions, stating each point separately, may be framed and submitted by the court on request of counsel, which the jury must answer before their discharge, so that the true legal significance of ascertained facts may be declared by the court. It is thus possible to see how the facts are determined, whether the law is properly applied, and how the special findings harmonize with the general conclusion."[31]

[29] Shipman, pp. 32, 33.

[30] Trial procedure is outlined in the next chapter.

[31] Shipman, pp. 45, 46.

The Judgment

A judgment is the official decision of a court upon the respective rights and claims of the parties to an action therein litigated and submitted to its determination, and may be either interlocutory or final. "Probably the best instances of interlocutory judgments are those entered by default in actions of assumpsit, covenant, trespass, case, and replevin, where the sole object of the action is the recovery of damages, by which at common law only the right to recover is determined, leaving the amount to be ascertained by writ of inquiry or other proceedings upon which a final judgment will be entered. There is one species of judgment, however, which establishes only the inadequacy of the defense interposed. This is the judgment for the plaintiff on a plea in abatement, which is a decision on a point independent of the merits of the case, and in form is always that the defendant answer over. The same form of judgment is also rendered in overruling a demurrer."[32] A final judgment, on the other hand, "is the award of relief provided by law for the redress of injuries or the enforcement of rights, as that the plaintiff do recover his damages, his debt, his possession, and the like, and the whole suit or action is merely the vehicle or means of pursuing and making application for this award. * * * The final judgment is the conclusion of law officially pronounced and declared by the court upon the facts found, after due deliberation and inquiry, declaring that the plaintiff has either shown himself entitled, or has not, to recover the redress he sues for."[33]

Enforcement of Judgments; Execution

A judgment is enforced by a writ of execution which is defined as "an authorization to an executive officer, issued from a court in which a final judgment has been rendered, for the purpose of carrying such judgment into force and effect. It is founded upon the judgment, must generally conform to it in every respect, and the plaintiff is always entitled to it to obtain a satisfaction of his claim, unless his right has been suspended by proceedings in the nature of an appeal or by his own agreement. * * * Theoretically a judgment is the end of the suit. But the mere judicial declaration of the right to redress, the award of relief, can produce no practical benefit or result, unless the defendant voluntarily submits and satisfies the plaintiff's demand."[34] A writ of execution is, therefore, the compulsory process by which the final judgment may be carried out through executive force. It is, in its nature, an executive remedy supplementary of the judicial remedy and may consist: "(1) In putting the plaintiff in possession of his land or property by force, the actual restitution of the thing taken or detained; (2) in taking from the defendant what belongs to him and turning it over to the plaintiff, or selling it at public auction, transferring title against the owner's will, and applying the proceeds to satisfy the judgment for money; (3) seizing the goods or land of the defendant, and holding them as security until the defendant conforms to the judgment; (4) seizing the person of the debtor himself and imprisoning him until he pays the debt or performs the commands of the court."[35]

32 Shipman, p. 49.
33 Shipman, pp. 47, 48.
34 Shipman, p. 50.

EQUITY PROCEDURE

106. Equity procedure is that which obtains in suits in equity, as distinguished from actions at common law, code actions, and criminal proceedings.

IN GENERAL

The principal steps and pleadings of equity procedure include the following: (a) plaintiff's bill of complaint; (b) the process; (c) defendant's appearance; (d) the defenses and cross-bill; (e) plaintiff's replication; (f) the decree; and, (g) the enforcement of the decree. These various steps and pleadings are outlined in the following paragraphs.

(1) The Bill of Complaint

Plaintiff's bill of complaint, which is analogous in general to plaintiff's declaration in an action at common law, is the initial pleading in equity and may consist of the following parts: (a) The caption, which is a statement of the court in which the case is filed, the term of the court, the names of the parties, and the character in which they sue and are sued, together with the number of the case; (b) The address, which is the part in which the plaintiff addresses by name the particular court whose interposition is desired; (c) The introduction, which is a statement of the names of the parties, their residences, the capacity in which they respectively sue and are sued, and generally whether they are

35 Shipman, p. 50

sui juris or under disability; (d) The premises, or stating part, which consists of the statement of the plaintiff's cause of action and is a recital of facts showing (1) a present existing title or interest in the plaintiff to the subject-matter of the controversy and a present right to sue in respect thereof, (2) an interest of defendant's in the subject-matter and a liability to plaintiff in regard thereto, and, (3) a full but concise statement of the injury and of which equity will take cognizance; (e) The confederating part, which consists of a charge that the defendants, and divers other persons unknown but whose names when discovered it is prayed may be inserted in the bill, have combined and confederated together to defraud plaintiff of his rights; (f) The charging part, which anticipates an expected defense and recites facts to show its futility; (g) The averment of jurisdiction, which is a statement of the pleader's conclusion that he is without adequate remedy at law and can, therefore, have his injury redressed only in a court of equity; (h) The interrogating part, which consists of the interrogatories which the defendant may be required to answer; (i) The prayer for relief, which consists of a statement of the redress which plaintiff desires, including the specific relief to which the plaintiff thinks he is entitled, and the general relief which plaintiff would have if the court declines to grant the specific relief prayed for; and, (j) The prayer for process, which is a prayer that the process of the court may issue to compel the defendant to appear and answer the bill and to perform whatever decree the court may pronounce against him.[36]

(2) The process

The process in equity by which the appearance of the defendant is obtained is called the writ of subpoena, and is defined as "a mandatory writ requiring the defendant to appear at a time therein named and answer the allegations of the bill of complaint."[37] A "process" in equity, however, may be one of three kinds: (a) An original process, which is that issued upon the filing of the original bill to compel the defendant's appearance in court; (b) A mesne process, which is that issued pending the suit for some collateral purpose, such as compelling the attendance of witnesses and the like; or, (c) The final process, which is that issued for the purpose of compelling obedience to the final decree of the court.[38] In regard to the original process, if the defendant fails to appear after being served therewith the plaintiff will be entitled to an order pro confesso against him.[39]

[36] See Clephane on Equity Pleading and Practice, (hereinafter cited "Clephane"), §§ 33, 37–47, pp. 64, 67–85.

[37] Clephane, § 117, p. 157.

[38] See Clephane, §§ 125–128, p. 167.

(3) The Defendant's Appearance

"Appearance," is the act by which a defendant in an equity suit, either in person or through his attorney, notifies the court that he has complied for all proper purposes with the subpoena requiring him to submit himself to such decrees as the court may render. Appearances are either general or special, a general appearance being one which is entered for the purpose of defending the case on the merits, whereas a special appearance is one for some special purpose only and which does not involve a contest on the merits.

(4) The Defenses and the Cross-bill

Similar to the procedure in actions at law, defenses in equity may be either dilatory or peremptory, the former being those defenses which are not addressed to the merits of the cause but which show some reason why the particular suit thereon should not be maintained either at any time or until after the happening of some future event,[40] whereas the peremptory defenses are those which are addressed to the merits of the alleged cause and which show some reason why such cause of action does not exist.

[39] An order pro confesso is, "an interlocutory decree which settles no substantive rights of the parties, but which merely forms the basis for a final decree at a later stage of the case if the order pro confesso shall not have meanwhile been set aside. Not only is it the right of the plaintiff to take such an order, but he should do so if he desires a final decree in the case. To support such an order there must have been service of process regularly made upon the defendant against whom the decree is taken." Clephane, pp. 332, 333.

[40] "Dilatory defenses may be classified under: (a) Objections to the jurisdiction. (b) Objections to the present determination of the controversy. (c) Objections to the person of the plaintiff or defendant, as, for instance: (1) That the plaintiff is an alien enemy. (2) That the plaintiff is an infant. (3) That the plaintiff is non compos mentis. (4) That the plaintiff is a fictitious person. (5) Misnomer of parties plaintiff or defendant. (6) That either plaintiff or defendant does not sustain the representative character specified in the bill. (d) Objections to the form of the proceeding, as, for instance: (1) Misjoinder of parties plaintiff or defendant. (2) Nonjoinder of parties plaintiff or defendant. (3) Multifariousness. (4) That the plaintiff has misconceived his form of action. (e) Objections that another suit is pending between the same parties." Clephane, pp. 175, 176.

Same; Defendant's Pleadings

The defendant's pleading may be (a) a disclaimer; (b) a demurrer; (c) a plea; (d) an answer; or, (e) a cross-bill. These various pleadings are defined as follows: "(a) A disclaimer is a written renunciation filed in the cause by the defendant, renouncing all right, title, and interest, in and to the subject-matter of the suit. (b) A demurrer is a written challenge by the defendant of the sufficiency of the bill of complaint, or of the part to which it is directed, either in matter of form or of substance. (c) A plea is a pleading reciting a single defense which, if true, is sufficient to delay or defeat the plaintiff's bill or the particular part thereof to which it is directed. (d) An answer is a written statement filed by the defendant embodying the facts of his defense and giving the discovery called for by the plaintiff as to so much of the bill as it professes to answer. (e) A cross-bill is one brought by the defendant against the plaintiff or other defendants in the same suit, or both, either to obtain discovery of facts in aid of the defense to the original bill, or to obtain full relief in favor of the party bringing it against some of the other parties to the suit."[41]

As a rule any dilatory defenses which appear on the face of the bill may be interposed by demurrer; or, if they do not so appear, with the exception of objections to the present determination of the controversy, they may be the subject of a plea or answer; or they may be set up by a combination of two or more of these pleadings. The peremptory defenses may also be interposed by the pleadings mentioned and by disclaimer and cross-bill. If more than one defense or pleading is used to oppose the same bill, however, each defense must clearly refer to and oppose a separate and distinct part of the bill.[42]

(5) Plaintiff's Replication

The replication is a formal written pleading made by the plaintiff in reply to the defendant's plea or answer, its object being to accomplish a joinder of issue upon the facts alleged by the defendant. It admits the legal sufficiency of defendant's pleading and closes the pleadings. A replication cannot state new matter in avoidance.[43]

41 Clephane, §§ 143–147, p. 181.
42 See Clephane, § 142, p. 176.
43 Clephane, §§ 252–254, p. 327.

(6) The Decree

Decrees may be either interlocutory or final, an interlocutory decree being one passed for the purpose of determining some matter of fact or law preparatory to a final decree, whereas a final decree is one which disposes of the merits of the case as among the parties affected thereby. It is the conclusion of the court, formally recorded after the hearing and submission of the cause.[44]

(7) Enforcement of Decrees

Decrees of courts of equity may be enforced in the following ways: (a) by process against a disobedient party for contempt of court; (b) by writ of sequestration; (c) by writ of assistance; and, (d) by writ of execution, in some jurisdictions. A writ of sequestration is "a process or commission, directed either to the proper officer of the court, or to certain persons nominated by the plaintiff and accepted by the court, commanding him or them to enter upon and take possession of the property of the defendant, receive the rents and profits thereof, and pay or dispose of the same as the court shall direct, until the party in contempt shall comply with the decree."[45] A writ of assistance, on the other hand, is employed whenever an injunction to obtain possession of property has been issued or a receiver or sequestrators or other persons appointed by the court to take possession, or any party to the suit is entitled to such possession under the decree. In such situations a writ of assistance may be issued to compel the transfer of the possession of such property to the person or persons entitled to it. The writ of assistance is also used to put in possession a purchaser at a sale held under a decree such as a foreclosure decree.

CODE PROCEDURE

107. Code procedure is that which obtains for civil actions in jurisdictions which have adopted statutory systems of procedure and pleading in supersession or modification of the common-law and equity systems.

In General

Because of the complexity of common-law and equity procedures and the confusion which existed because of the two systems, movements for reform arose in both England and the United

44 See Clephane, §§ 302, 304, 305, pp. 377, 378.
45 Clephane, pp. 398, 399.

States. "The reform movement in England, headed by Bentham and his followers, had its first effect in the Hilary Rules of 1834, [framed by the judges in pursuance of the Statute of 3 & 4 Wm. IV, c. 24], which among other things required the defendant to go further in setting forth his defenses than formerly. This was followed by the Common-Law and Equity Procedure Acts of 1852 and following years, and ultimately by the Supreme Court of Judicature Act of 1873. Under the latter act, now in force as amended in England, the high courts are united in one, and equity and law are combined in a single system which has a close similarity to code pleading. The development of procedural rules is largely in the hands of the judges under their rule-making power."[46] In the United States, on the other hand, "the movement for pleading reform resulted in the adoption of the New York Code of 1848, the model and forerunner of all the practice codes in states which have adopted code pleading. By this act a single combined system of law and equity administered through the form of the one civil action was substituted for the two separate law and equity systems previously existing, and the forms of action at law and the separate suit in equity were abolished. It was further provided that the pleadings should state the facts, and the forming of the issue was less stressed. In addition to the fusion of law and equity and the substitution of fact pleading for issue pleading, the code adopted for all actions various equity principles."[47]

The Code Summons and Course of Proceedings

An action in a court of justice must be initiated by some form of notice to the party or parties against whom relief is sought, a requisite met at common law by the original writ and writ of summons, and in equity by the writ of subpœna. Under the codes this notice is ordinarily a simple written summons signed by the plaintiff or his attorney, which directs the defendant to

46 Clark on Code Pleading, § 6, p. 14.

47 Clark on Code Pleading, § 7, p. 17. The fusion of law and equity in the United States, and particularly the fusion of the federal systems, is also discussed in § 29, supra.

Within twenty-five years from the adoption of the New York Code of 1848, a system of code procedure and pleading had been adopted in twenty-four of the states, and such a system now obtains in most of them. "The non-code states and common-law states may be classified as quasi code states and common-law states and show a varying degree of approximation to the code practice. All, however, have departed somewhat from the common-law system." Clark on Code Pleading, § 8, p. 19.

appear before a specified court at a specified time to answer the plaintiff's complaint, or else suffer judgment by default. "After the defendant is summoned, the plaintiff states his case in his complaint, the first formal pleading of the case. The defendant may raise an issue of law as to the sufficiency of the complaint by filing a demurrer, or in some states, a motion. If the complaint is sufficient, he must file his answer, unless he is willing to suffer default. In his answer he admits or denies the plaintiff's allegations and adds new matter of defense if he has any. With the plaintiff's reply the pleadings are closed in most jurisdictions."[48] Then follows the actual trial with the production of the parties' evidence, the arguments of counsel, the verdict, and the judgment.

The Code Complaint

The first pleading on the part of the plaintiff under the code system is the complaint, and is analogous to the declaration at common law and the bill of complaint in equity. "It must contain: (1) a formal introductory part or caption specifying the names of the parties and the court, (2) a statement of the facts constituting the plaintiff's cause of action, and (3) a demand for the judgment to which he supposes himself entitled."[49]

The Code Demurrer

After the plaintiff has stated his case it is incumbent on the defendant to meet the issues raised against him and this he may do by objecting to the form or legal substance of the plaintiff's cause as set out in the complaint, or by defending through denial or plea of new matter. The latter course involves the filing of an answer; the former, the employment of some device by which an objection to the complaint may be made. Demurrers and motions constitute such devices. Thus, "under the code the dilatory plea as a separate pleading is abolished in all but a few states; its place being taken by the demurrer, or, where affirmative allegations are necessary, by the answer in abatement. * * * The codes specify the grounds of demurrer to the complaint, usually six, but occasionally more in number. These include questions of jurisdiction, capacity, another action pending, defect of parties, improper joinder of causes of action, and failure to state facts sufficient to constitute a cause of action. Grounds of demurrer to the answer or reply, of like general nature, are also

48 Clark on Code Pleading, § 14, p. 42.

49 Clark on Code Pleading, § 35, p. 138.

specified. * * * Judgment is not rendered directly upon the demurrer, but after the decision thereon the party against whom it is rendered is allowed to replead, and judgment is only rendered on his failure to do so. The more usual rule does not permit of an appeal directly from the ruling on the demurrer, and upon repleading issue is taken only upon the new pleadings. Thereafter the former pleading is substantially eliminated from the case and is not the subject of appeal. Where final judgment is rendered after demurrer overruled or sustained, such judgment is res judicata upon the facts alleged and, by the better rule, upon the whole matter which is the subject of the dispute between the parties. [However], the tendency of modern pleading reform is to abolish the demurrer, as calling for narrow distinctions from the motion, as requiring an extra and generally inconclusive proceeding in advance of trial, and as lacking flexibility, due to the precedents governing it and the limited decisions available upon it."[50]

Motions Under the Codes

The modern tendency is to substitute motions for demurrers. "Any application for an order of the court is a motion. Motions may thus raise defects of pleading or of parties, or may ask for a summary disposition of the case or a pleading, or may concern many incidental matters during and after the trial of a case. The motion to make a pleading more definite and certain is the usual remedy where a pleading is indefinite and uncertain. Motions to elect and to separate are used where a pleader has failed to separate causes of action or defenses. Motions to expunge or strike are used either to strike from the files entire pleadings which are improper or to expunge from a pleading parts thereof which are immaterial or otherwise improper. Motions for judgment on the pleadings are available where, after the pleadings are closed, only issues of law are presented by them. In practice, as to several of these forms of motions it is difficult to determine whether a motion or a demurrer should be used. This difficulty constitutes one of the arguments for abolition of the demurrer."[51]

The Code Answer

The defendant's answer under the codes is the pleading by which he may allege any new matter constituting a defense or counterclaim, or deny the allegations contained in the com-

50 Clark on Code Pleading, §§ 77, 78, 83, 85, pp. 341, 344, 365, 371.

51 Clark on Code Pleading, § 86, p. 374.

plaint. Such denials are either general or specific, the most direct form of a general denial being a denial of each and every allegation of the complaint; and although general denials are not allowed in a few of the code jurisdictions, the more usual rule is to permit them.[52] Specific denials, on the other hand, are denials of specific allegations of the complaint.

Same; Answer in Abatement

In almost all of the code states pleas in abatement or to the jurisdiction are not permitted as separate pleadings and the objections stated in such pleas under the common-law practice must be stated as a separate defense in the answer. The decision on such a defense will be only in abatement, not in bar of the suit. "Objections which may be stated in such answers are those objections given in the codes as grounds of demurrer, where such objections do not appear on the face of the complaint. They involve such matter as jurisdiction, capacity of the parties, joinder of parties and of causes, and the pendency of another action."[53]

Same; Equitable Defense

The term "equitable defense" is applied to matter such as fraud and mistake leading to reformation or cancellation of a written instrument. Matter defensive in its nature but which under the former procedure could only be relied on by an affirmative bill in equity. "Under the codes it may be pleaded by the defendant in his answer, but there is doubt whether it should be pleaded as a defense or a counterclaim."[54]

Same; Counterclaim

The set-off of mutual debts between a plaintiff and a defendant was first allowed in actions at law by a statute enacted in 1705,[55] which permitted such set-offs in actions brought by insolvents; and mutual debts generally were allowed to be set off by a statute enacted in 1729.[56] Recoupment, however, based upon facts arising out of the transaction sued upon and reducing the plaintiff's recovery, was recognized without the aid of statutes but it was essential that the claims of both plaintiff and defendant involve the same "subject-matter," or arise out of the

52 See Clark on Code Pleading, §§ 89, 90, pp. 388–402.

53 Clark on Code Pleading, § 93, p. 410.

54 Clark on Code Pleading, § 96, p. 427.

55 4 Anne, c. 17, § 11.

56 Geo. II, c. 22, § 13.

"same transaction," and that they be susceptible of adjustment in the same action. In equity, set-off was allowed where circumstances such as the insolvency or fraud of one of the parties or the existence of mutual credits, made it equitable to do so.[57]

Under the codes the results achieved by recoupment and set-off are obtainable by provisions which permit the defendant to file counterclaims in his answer. Such a counterclaim must generally be one either arising out of the contract or transaction sued upon or connected with the subject of the action; or, in an action arising upon contract, any other cause arising also upon contract and existing at the commencement of the action.[58]

The Code Reply

The common-law system of pleading contemplated successive pleadings in alternation by each party until an issue was reached upon which one party assumed the affirmative and the other party the negative, but under the codes the purpose of the pleadings is not so much to obtain a narrow issue as to have each party's view of the facts on record as concisely and as quickly as possible. Consequently, under the codes the pleadings are definitely limited in number although a single issue may not be thus secured.

Except for objections to the sufficiency in law of the plaintiff's reply which may be made by demurrer of the defendant, or for objections to the form of the reply which may be made by motion, in nearly all of the code states the pleadings must stop with the reply. The statutory provisions regulatory of replies vary, and "by some codes a reply is provided only as an answer to a counterclaim; by others a reply may also be required to new matter, by order of the court on motion of the defendant; and by others and a more numerous class a reply must be made to any new matter in the answer or else it stands admitted."[59] A

[57] See Clark on Code Pleading, pp. 436–438.

[58] As a rule, a counterclaim must be one in favor of the defendant pleading it and against the plaintiff; and the defendant, under most codes, may not cause new parties to be brought in so that he may use a counterclaim against the plaintiff and others. However, a few codes expressly provide for counterclaims against either the plaintiff or another defendant, and some codes provide for relief against co-defendants or new parties by cross-complaint, but "such cross-complaint must arise out of the facts relied upon in the original complaint and its use is within the sound discretion of the court." Clark on Code Pleading, § 103, p. 470.

[59] Clark on Code Pleading, § 105, p. 479.

reply or "answer" to a counterclaim, however, is necessary under all codes.[60]

The "One Form of Action" Under the Codes

The fundamental reform of code procedure and pleading was the substitution of the "one form of action" for the various forms of action at law and for the suit in equity. "This substituted for the two separate courts of law and equity a single court with a 'blended' system of law and equity and without the ancient subdivisions of the writ system of the common law."[61]

At common law the number and extent of grievances for which the plaintiff might seek redress in a single suit were arbitrarily limited by the forms of action, whereas in equity principles of trial convenience alone applied. Hence, "the code adopted the equity rule in substance, but attempted to give it precision by the concept of 'cause of action,' denoting a single occasion for judicial relief. Various more or less conflicting views of the nature of a single cause of action are expressed by courts and authors. The most convenient one is to consider a cause of action as an aggregate of operative facts giving rise to a right or rights termed 'right' or 'rights of action' which will be enforced by the courts. The number and extent of operative facts included within a single cause of action are to be determined pragmatically, mainly by considerations of practical trial convenience. There is no absolute or arbitrary test."[62]

Special Proceedings

Under the codes the term "action," when applied to civil judicial proceedings, denotes an ordinary suit brought by one party against another for the enforcement of a right. Every other proceeding brought by a person for the enforcement of a right is a "special proceeding." "The more important special proceedings include mandamus, prohibition, certiorari, habeas corpus, quo warranto, scire facias, replevin, divorce and the various appeals from special courts and tribunals, such as appeals from probate, from workmen's compensation and public utilities commissions, and from municipal assessment boards. While the rules of pleading do not apply in extenso to special proceedings, usually such rules are applied by analogy as far as conveniently possible."[63]

[60] Clark on Code Pleading, p. 484.

[61] Clark on Code Pleading, § 15, p. 44.

[62] Clark on Code Pleading, § 19, p. 75.

[63] Clark on Code Pleading, § 20, p. 87.

CRIMINAL PROCEDURE

108. Criminal procedure is that which obtains in proceedings and prosecutions against persons suspected and accused of crime.

IN GENERAL

The principal steps and pleadings of criminal procedure include the following: (a) the arrest; (b) the preliminary examination; (c) bail and commitment; (d) the modes of accusation; (e) the motion to quash; (f) the arraignment and pleas of the accused; (g) the trial and verdict; and, (h) the judgment and sentence. These various steps and pleadings are outlined in the following paragraphs.

(1) The Arrest

An arrest is defined as "the taking of a person into custody."[64] In proper cases at common law and by statute an arrest may be made by a public officer or a private person acting without a warrant; in other cases, an arrest to be valid must be made under the authority of a warrant. A warrant is defined as "a writ or precept, issued by an authorized magistrate, addressed to a proper officer or person, requiring him to arrest the body of an offender, or suspected offender, therein named, and bring him before a proper magistrate, to be dealt with according to law."[65] To authorize the issuance of a warrant before indictment "there must be made before the proper magistrate a proper complaint, on oath or affirmation, showing that a crime has been committed, and that there is probable cause to suspect the accused. After indictment, the usual practice is to issue a bench warrant."[66]

(2) The Preliminary Examination

The preliminary examination is the initial hearing to which an arrested person is entitled. Thus, "both at common law, and very generally by statutes in the different states, a person arrested on a charge of crime is entitled to a preliminary examination before a proper magistrate, without unnecessary delay, to determine whether a crime has in fact been committed, and, if so, whether there is probable cause to suspect that he is guilty

64 Clark's Criminal Procedure, 2d Ed., (hereinafter cited "Clark"), § 4, p. 24.

65 Clark, § 5, p. 27.

66 Clark, § 6, p. 27.

of its commission. Without such an examination as soon as the circumstances will permit, the detention of the accused will be unlawful."[67]

(3) Bail and Commitment

Bail is defined as the security given by a person charged with a crime for his appearance for further examination, or for trial, whereupon he is suffered to go at large.[68] A person accused of crime may, on adjournment of his preliminary examination, "be admitted to bail to secure his appearance for further examination, and not for trial. * * * At common law any magistrate, judge, or court having jurisdiction to try and punish for a crime, has, as incident to such jurisdiction, the power to admit to bail in cases where the offense is bailable. Jurisdiction to admit to bail is now very generally regulated by statute. It may be exercised by the magistrate before or at the preliminary examination, and provision is also made for application to the higher courts or judges, including the judges of the supreme court. The question must be determined in each state by reference to the statute."[69]

At common law "it was within the discretion of the magistrate, judge, or court having jurisdiction and power to allow or deny bail in all cases. It could be allowed whenever it was deemed sufficient to insure the appearance of the accused, but not otherwise, and was therefore always allowed in cases of misdemeanor, less frequently in cases of felony, and almost always denied in cases of felony punishable by death. It is now generally declared by the constitutions of the different states, or provided by statute, that the accused shall have an absolute right to give bail in all cases except where the punishment may be death, and even in those cases except where the proof is evident or the presumption great."[70] If the offense is not bailable, or if bail is refused or not given, the accused is committed to jail to await his trial. To authorize the detention of the accused after he is committed, a mittimus or warrant to the jailer is necessary.[71]

(4) The Modes of Accusation

The prosecution of a person charged with crime may be either: "(a) Upon an indictment or presentment upon oath by

67 Clark, § 35, p. 87.

68 See Clark, § 36, p. 99.

69 Clark, p. 100.

70 Clark, §§ 37, 38, p. 102.

71 See Clark, p. 118.

a grand jury. (b) Upon a coroner's inquisition in cases of homicide. (c) Upon an information preferred by the proper prosecuting officer without the intervention of a grand jury. (d) Upon a complaint or information made under oath by a private person."[72]

(5) The Motion to Quash

The motion to quash is a device available to the defendant for the purpose of attacking the indictment. And a motion to quash the indictment will lie if it is insufficient as a matter of law "because of any defect apparent on the face of it or of the record, or if counts are joined in it which, by law, ought not to be joined; and in the latter case the court may, in its discretion, quash one or more counts. In some states the motion will lie for defects not apparent on the face of the record. The motion may be made at any time before verdict, unless it is otherwise provided by statute. All motions to quash are, at common law, addressed to the discretion of the court; and it may, if it thinks proper, leave the defendant to his remedy by demurrer, motion in arrest of judgment, or writ of error."[73]

(6) The Arraignment and Pleas of the Accused

Generally, there can be no valid trial until the accused or defendant is arraigned and pleads to the indictment, but in some states a formal arraignment may be expressly or impliedly waived. "In the arraignment the defendant must be called to the bar of the court, the indictment must be distinctly read to him, and he must be asked whether he pleads guilty or not guilty. If he stands mute, and obstinately refuses to answer, a plea of not guilty is entered for him by the court."[74] There are, however, various objections which the defendant may raise before answering to the merits and which, as a rule, he must raise before then if he raises them at all. As has been indicated, he may move to quash the indictment, but objection may be made in this way at any time before verdict. In addition to the motion to quash, the defendant may make any one of the following pleas: (a) If the court has no jurisdiction, he may raise the question by a plea to the jurisdiction. (b) If there is any defect, whether apparent on the face of the indictment or record, or founded upon some matter of fact extrinsic of the record, which renders the particular indictment insufficient, he may take advantage of it by

[72] Clark, § 46, p. 122.

[73] Clark, §§ 124–126, p. 416.

[74] Clark, § 128, p. 421.

a plea in abatement, and, if the plea is sustained, the indictment will be abated or quashed. (c) If, admitting every fact properly alleged in the indictment to be true it appears on the face of the indictment and record that as a matter of law the defendant cannot be required to answer because the indictment fails to charge any offense, or is otherwise insufficient, or there is want of jurisdiction, the defendant may demur. (d) If, without entering into the merits of the charge and independently of any question of guilt or innocence, there is some extrinsic fact which prevents any prosecution at all for the offense charged, and does not go merely to the sufficiency of the indictment as where the defendant has already been acquitted or convicted of the same offense, or has been pardoned, he may specially plead this matter in bar of the indictment which plea is designated as a special plea in bar. "After this comes the plea of not guilty, which is a plea to the merits and forms the general issue."[75]

(7) The Trial and Verdict

By pleading not guilty the defendant denies every fact and circumstance necessary to make him guilty of the crime charged, produces or joins the issue, and is thereafter entitled to a speedy trial.[76] Some of the more important rules or precepts applicable to such a trial are as follows: (a) Ordinarily the trial must take place in the county in which the offense was committed and the indictment presented, but either at common law or by statute, if the defendant cannot have a fair and impartial trial in such county, the case may be taken to an adjoining county. This is called a change of venue.[77] (b) As a rule, the trial must be public, but this does not prevent the judge from excluding, in a proper case for the protection of the public morals, young persons and persons present merely from idle curiosity.[78] (c) The defendant must be personally present during the entire proceeding, from arraignment to sentence; and, generally, he cannot waive this privilege in cases of felony or in cases of misdemean-

[75] Clark, p. 426.

[76] Concerning criminal prosecutions, Amendment 6 of the Federal Constitution U.S.C.A. provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[77] See Clark, § 144, p. 485.

[78] See Clark, § 145, p. 489.

or involving corporal punishment (in some states), but, by the weight of authority, he may waive this privilege in cases of misdemeanor.[79] (d) The judge must be present during the whole trial.[80] (e) In all criminal prosecutions the defendant is entitled to a trial by jury and in some states he cannot waive this right in any case where such a trial was by jury at common law, but in other states he may waive the right in prosecutions for a misdemeanor and in others he may also waive it in cases of felony.[81]

After the evidence has been submitted, counsel for the state and defendant have presented their arguments, and the judge has given his instructions, the jury deliberates and its verdict is rendered. The verdict is the formal decision by the jury that the defendant is guilty or not guilty and is either: "(a) General; that is, a finding of guilty or not guilty on the whole charge, and both on the law and the facts. (b) Special; that is, where the jury find the facts only, and leave the law to be applied by the court. (c) Partial; that is, where the jury find the defendant guilty of part of the charge only." [82]

(8) The Judgment and Sentence

If the jury returns a verdict of not guilty, thereby acquitting the defendant, the proceedings are terminated and the verdict can thereafter be pleaded in bar to any subsequent prosecution against the defendant for the same offense. However, if the jury returns a verdict of guilty it is the duty of the judge to render judgment and pronounce sentence thereon within the limits fixed by law.[83] Sentence having been imposed the convicted is turned over to the proper officers for its execution and enforcement.

79 See Clark, § 148, p. 492.

80 See Clark, § 153, p. 502.

81 See Clark, § 158, p. 507.

82 Clark, § 184, p. 562.

83 After verdict of conviction but before judgment, the defendant may move in arrest of judgment. "Formerly almost any objection which would have been fatal on demurrer could be made the ground of a motion in arrest of judgment, but this rule has been to a great extent changed by statute. Such a motion will lie, however, whenever the indictment is insufficient to sustain a judgment, or the verdict is insufficient; but it will not lie for any defect which is cured by verdict at common law, or which may be and is cured by statute. It only lies for matter appearing on the record." Clark, § 186, p. 575.

CHAPTER 24

TRIALS

IN GENERAL

109. A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue.[1]

ANGLO-SAXON MODES OF TRIAL

(1) Trial by Oath—Wager of Law

The accustomed Anglo-Saxon modes of trial were variations of two, oaths and ordeals, and judgment in the communal courts consisted merely in awarding to a party or condemning him to the mode of trial to be pursued. The trial itself was not a rational investigation of the facts involved but rather an appeal to the supernatural, the theory being that God would intervene with a miracle to show the right. "In disputes about property and contract, the party to whom the trial or test had been awarded by the judgment of the freemen could in most cases settle the matter by his oath, not by way of testifying to the facts, but by repeating a set form of words setting out his whole claim or defense. Usually the oath of a defendant had to be supported by the oaths of some designated number of freemen from his hundred, who 'with united hand and voice' sworn together as 'oath-helpers' that his oath was 'clean and without falsehood.' The efficacy of these oaths lay, not in the substance of what was said, but the oath itself, the solemn assertion 'before God and his saints,' provoking the wrath of Heaven if the oath were false. If any slip was made in pronouncing the proper words, or if a sufficient number of helpers was not present, the oath 'burst'; it was regarded as the judgment of God, and the party lost his case and was punished for his false claim or defense."[2] Such modes of trial continued to be used for centuries after the Norman Conquest, trial with oath-helpers then being called "compurgation" or "wager of law."

1 Black's Law Dictionary 3d. Ed., p. 1754, citing Marsch v. Southern New England R. Corporation, 235 Mass. 304, 126 N.E. 519, 520, 1920.

2 Bowman on Elementary Law, Part I, p. 143.

or involving corporal punishment (in some states), but, by the weight of authority, he may waive this privilege in cases of misdemeanor.[79] (d) The judge must be present during the whole trial.[80] (e) In all criminal prosecutions the defendant is entitled to a trial by jury and in some states he cannot waive this right in any case where such a trial was by jury at common law, but in other states he may waive the right in prosecutions for a misdemeanor and in others he may also waive it in cases of felony.[81]

After the evidence has been submitted, counsel for the state and defendant have presented their arguments, and the judge has given his instructions, the jury deliberates and its verdict is rendered. The verdict is the formal decision by the jury that the defendant is guilty or not guilty and is either: "(a) General; that is, a finding of guilty or not guilty on the whole charge, and both on the law and the facts. (b) Special; that is, where the jury find the facts only, and leave the law to be applied by the court. (c) Partial; that is, where the jury find the defendant guilty of part of the charge only." [82]

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1 Black's Law Dictionary 3d. Ed., p. 1754, citing Marsch v. Southern New England R. Corporation, 235 Mass. 304, 126 N.E. 519, 520, 1920.

2 Bowman on Elementary Law, Part I, p. 143.

(2) Trial by Ordeal

The Anglo-Saxon mode of trying persons accused of crime was by ordeal. Thus, "in criminal accusations a man of good repute could usually clear himself by the oaths of himself and his oath-helpers; but if the circumstances pointed strongly to his guilt, or if the previous character of the accused was bad by common report, he was sent to some form of ordeal. In the more common ordeals, the person to whom the test had been adjudged was bound and cast into a pool or stream of water or was made to walk blindfold among red-hot plowshares, or to carry red-hot iron, or to plunge his arm into boiling water. If the pool or stream 'refused to receive' him, i. e., if he floated, or if he was seriously burned or scalded, it was believed that God had adjudged him guilty. These ordeals were no doubt survivals from ancient heathen appeals to the god of fire or water, as the case might be. The Church at first objected to them, then provided impressive prayers and ceremonials to accompany them, and finally, but not until long after the Norman Conquest, forbade the clergy to participate in them."[3]

(3) Trial by Battle

Trial by battle or judicial combat was a form of ordeal used by most of the Germanic tribes and consisted of a duel fought under the supervision of the court. However, "it was not merely an appeal to physical force, but was based on the belief that God would give the victory to the right. As a Norman importation it took its place after the Conquest along with the Anglo-Saxon modes of trial in both the feudal and the royal courts. Though hated by most of the English, it was much used in criminal accusations and in litigation over land, and had lasting consequences in the formulation of criminal law and the law of property."[4]

Development of Trial by Jury

In the thirteenth century, the common-law courts began to develop what has become trial by jury from the inquest or recognition used in the possessory assizes. The group of neighbors that constituted the members of the petty assize, summoned for the purpose of answering the single question put in the original writ, were gradually permitted, (if the parties so agreed), to decide the issue raised by the pleadings, or a second group of neighbors was called for such purpose and displaced the first group. Thus, the jury trial originated from the possessory assizes, where it was an optional mode of trial invoked by agreement of the parties, and as it began to spread to other actions the older modes of trial declined and ordeals were forbidden by Henry III in 1219, following the example of the Church. In all the newer actions, such as the writs of entry, trespass, case, trover, assumpsit, and ejectment the judges permitted trial by jury only. However, "the archaic trials (other than ordeals) could still be demanded as a right in all the actions to which they had anciently pertained. By the sixteenth century they were almost unheard of in practice, but the right to demand them gave defendants a ready means of defeating meritorious claims or forcing a compromise. * * * The judges could not or did not abolish them outright; instead by many ingenious turns and quibbles they permitted the newer actions, in which they did not apply, to be perverted to do the work of the actions in which they could be demanded. This indirect method of solving the difficulty provided a certain modernization of the law; but many distortions of principle in our law today, and a host of the fictions, originated in this manner as subterfuges for evading these irrational and long outgrown modes of trial, and have no other basis or explanation. Parliament, strangely enough, did not abolish wager of law until 1819, or wager of battle until 1833."[5]

In prosecutions for crime trial by jury depended, theoretically at least, upon the consent of the accused. "His strict right was to prove his innocence in one of the ancient ways, and of this he could not be deprived without his consent. But battle did not lie when the crown was the accuser, wager of law did not apply to the graver offenses, and ordeals had been abolished. The remarkable result was that an accused person who refused jury trial could not be tried at all. The expedient adopted by the judges to meet this dilemma was the *peine forte et dure* (torture strong and hard)—the prisoner was stretched out naked on the floor of the dungeon and weights were heaped upon him until he either consented or was crushed to death. Only after more than five hundred years of this barbarity was the modern solution reached, to put him on trial before a jury whether he consented or not."[6]

Like the petty assize, the jury was at first a body of neighbors called in to answer questions from their own knowledge; they

3 Bowman, pp. 143, 144.

4 Bowman, p. 144.

5 Bowman, p. 179.

6 Bowman, pp. 179, 180.

were both witnesses and triers of fact. But very gradually, at the hands of the king's judges, "juries lost their function of witnesses and took on exclusively the character of triers obtaining the facts from the testimony of witnesses called before the court or from documents introduced in evidence, and receiving the law applicable to the facts in the form of instructions from the judge. The problem of greatest difficulty has been to determine the respective provinces of judge and jury, involving as it does questions as to the control by the judge and the independence of the jury."[7] Generally, however, it may be said that the function of the jury is to determine questions of fact; the function of the judge, to determine questions of law.

Trial by Jury at Common Law and Under the Codes

The determination of issues of fact by a jury became a distinctive feature of common-law procedure and a right of the parties to actions at law, unless such right was waived. In equity, however, issues of fact were ordinarily determined by the chancellor, although he might have the issues presented to a jury but in such a case the verdict rendered was advisory only.

Concerning the common-law right of trial by jury, the Constitution of the United States[8] provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"; and, the constitutions of many of the states preserve the right of a jury trial. However, "the constitutional right of trial by jury does not make necessary a separate system of law and equity. It applies no further than to give the right of such trial upon issues of fact so tried at common law. * * * Statutes in the code states provide when trial by jury may be had. The clearer form of statute is simply declaratory of the constitutional provisions, giving the option to claim such right in all cases so triable under the former practice. Under the other and more general form, the kinds of action so triable are enumerated, but this, by the better view, is to be construed as of the same effect as the first type of statute."[9] In regard to the right of trial by jury under the unified federal system, the Federal Rules of Civil Procedure[10] in part provide, "The right of trial by jury as declared by the Seventh Amendment of the Constitution or as given by a statute of the

7 Bowman, p. 180.

8 Am. 7, U.S.C.A.Const.

9 Clark on Code Pleading, § 16, p. 52.

10 Rule 38, 28 U.S.C.A. following section 723c.

United States shall be preserved to the parties inviolate. * * * Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action. * * * In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. * * * The failure of a party to serve a demand as required by this rule * * * constitutes a waiver by him of trial by jury."[11]

Selection of Jury and Subsequent Procedure

The ordinary procedure in a trial by jury includes: (a) the impaneling of the jury; (b) the opening statement; (c) the production of testimony and other evidence; (d) the arguments of the attorneys; (e) the judge's instructions to the jury; and, (f) the verdict and judgment. The procedure is similar in a trial without jury, except of course that no jury is impaneled, there are no instructions, and there is no verdict separate from the judge's judgment or decree.

Same; Examination of Jurors

When an action at law is called in court the jury is drawn and selected from the "panel," which consists of a list of prospective jurors summoned according to law by the proper officer to serve at a particular term of the court, or for the trial of a particular action. Their names are drawn by lot and each is examined by the attorneys for the respective parties to the action. This examination is provided for the purpose of determining whether or not the persons called are properly qualified to serve as jurors in the particular action; and if, during the examination, it is disclosed that a prospective juror is biased or otherwise disqualified to serve, counsel may properly object, such objection being termed a "challenge for cause," and the place of the person so objected to will be taken by another on the panel. In addition to challenges for cause each party is ordinarily allowed a certain number of peremptory objections to prospective jurors which will be sustained by the judge although no cause is shown.

11 The waiver of trial by jury is also expressly provided for in the codes of the several states, but the provisions differ. Under some, there must be affirmative action by a party before he loses his right to such a trial, whereas the statutes of other jurisdictions, like the federal rule, provide that the right is lost by mere omission to claim it within a specified time.

Same; Opening Statement

When the proper number of persons necessary to compose a jury, (usually twelve), have qualified, the jury is sworn. Then, "as preliminary to the introduction of evidence, the plaintiff's counsel, or that side which has the affirmative of the question at issue, and from whom proof is first required, has the right to make an opening statement. He briefly tells what are the issues in the case, states what is admitted and what is disputed, gives an outline of what he expects to prove, and shows the bearing of the evidence which he intends to produce. After this prologue, he then proceeds to call his witnesses and introduce his documentary evidence. The opening statement for the defendant may be reserved until after the close of plaintiff's evidence, or may be made immediately after the opening by plaintiff, in order to get the issues squarely before the jury at the outset."[12]

Same; Production of Evidence

The evidence may consist of documents or the oral testimony of witnesses, or both, whether the proceeding is an action at law or a suit in equity, although originally in equity all evidence had to be documentary. Witnesses are summoned by means of a writ of subpœna and after being sworn to testify to the truth are questioned in regard to what they know of the matter in dispute. The party who produces a witness is the first to examine him, such examination being termed "direct." The opposite party may then "cross-examine" the witness by questions pertaining to the matter brought out on the direct examination, and the cross-examination may be followed by a "redirect" examination, which, in turn, may be followed by a "recross-examination."[13]

Same; Arguments of Counsel

The production of testimony is followed by the arguments of the attorneys in which they sum up the evidence, as "it is for the lawyer to point out where his adversary has failed to prove his case, and by a connected presentation of his own evidence, to make the jury see the controlling points. He may comment freely upon every pertinent fact in evidence, criticize the witnesses, their powers of observation in view of the circumstances of sight, hearing, or perception, their accuracy and memory in

[12] Shipman on Common-Law Pleading, p. 36.

[13] For a more complete discussion of the examination of witnesses, see McKelvey on Evidence, 4th Ed., pp. 408–435.

view of age and manner of testifying, their credibility and truthfulness in view of bias, moral character, or the improbability of their story, and by thus testing what to believe and what to discredit he may strive to convince their judgment, as well as to persuade their feelings and inclinations, to decide in favor of his client."[14] Ordinarily, in actions at law, the attorney for the plaintiff has the advantage of making the opening and closing speeches to the jury; and the same is true in respect of the prosecuting attorney in criminal prosecutions in most states, but in some states the prosecuting attorney is not allowed to reply after the defendant's attorney has spoken to the jury in a criminal prosecution.

Same; Instructions, Verdict, and Judgment

Following the arguments of counsel, the judge instructs the jury as to the rules of law applicable to the facts which the evidence tends to prove, and thereafter the jury deliberates, returns its verdict, and the judge renders judgment. The trial is then ended, and if a new trial or an appeal is not obtained—on grounds specified by law therefor, within the time allowed for such procedures—the judgment rendered becomes final.

[14] Shipman on Common-Law Pleading, 3d Ed., p. 42.

APPENDIX

A. The American Law Institute and the Restatement.

The following general information concerning the American Law Institute and the Restatement is from the Restatement of the Law of Torts.

"The Institute was organized on February 23rd, 1923. The organization meeting was attended by the Chief Justice of the United States and other representatives of the Supreme Court, representatives of the United States Circuit Courts of Appeals, the highest courts of a majority of the States, the Association of American Law Schools, the American and State Bar Associations, and the National Conference of Commissioners on Uniform State Laws. The meeting was held in response to an invitation issued by a voluntary committee, of which Mr. Elihu Root was chairman, on the Establishment of a Permanent Organization for the Improvement of the Law, the Committee having prepared a report recommending the establishment of an American Law Institute.

"The Institute is composed of two classes of members—elected life members and official members. Official members are the justices of the Supreme Court of the United States, senior judges of the United States Circuit Courts of Appeals, the chief justices of the highest courts of the several States and the District of Columbia, the president and members of the Executive Committee of the American Bar Association, the presidents of State Bar Associations, the president of the National Conference of Commissioners on Uniform State Laws, the presidents of certain learned legal societies such as the American Society of International Law, and the deans of member schools of the Association of American Law Schools. The articles of association provide for 750. The membership is nation-wide.

"The executive body of the Institute is a Council composed of thirty-three members. One-third of the members of the Council are elected every three years at a meeting of the members of the Institute. They hold office for nine years. The executive officer of the Institute is the Director, who is also secretary and executive officer of the Council and ex-officio chairman of the legal staff.

"The object of the Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years.

"The Institute recognizes that the every increasing volume of the decisions of the courts, establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complication of economic and other conditions of modern life, are rapidly increasing the law's uncertainty and lack of clarity; and that this will force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity could be found.

"The careful restatement of our common law by the legal profession as represented in the Institute is an attempt to supply this needed factor. The object of the Institute is accomplished in so far as the legal profession accepts the Restatement as prima facie a correct statement of the general law of the United States.

"The sections of the Restatement express the result of a careful analysis of the subject and a thorough examination and discussion of pertinent cases. The accuracy of the statements of law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession."[1]

B. The National Conference of Commissioners on Uniform State Laws.

The following general information concerning the National Conference of Commissioners on Uniform State Laws is from Uniform Laws Annotated, vol. 5.

"The National Conference of Commissioners on Uniform State Laws is a body of Commissioners deriving their authority from appointment by the Governors of their respective states. The Commissioners meet annually in a Conference of six days, at which the acts drafted by committees under instructions from a previous Conference are carefully considered and discussed by

[1] 1 Restatement of the Law of Torts, pp. vii–ix.

the entire body. Acts are not approved until they have been considered section by section by at least two annual Conferences.

* * *

"Since the intention of the legislatures in adopting these Uniform Acts is to make uniform the law of those states which enact them, the judicial decisions construing any one of these laws are authoritative, not only in the jurisdiction in which they are rendered, but in every other jurisdiction in which the same law has been adopted."[2]

The following paragraphs constitute a list of the Uniform State Laws cited and quoted in the text, and the jurisdictions in which such acts are in force.

The Uniform Arbitration Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1925, has been adopted in the following jurisdictions effective from the year indicated: Nevada, 1925; North Carolina, 1927; Utah, 1927; Wyoming, 1927.[3]

The Uniform Bills of Lading Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1909, has been adopted in the following jurisdictions, effective from the year indicated: Alabama, 1931; Alaska, 1914; Arizona, 1921; California, 1919; Connecticut, 1911; Delaware, 1927; Idaho, 1915; Illinois, 1927; Iowa, 1911; Louisiana, 1912; Maine, 1917; Maryland, 1910; Massachusetts, 1910; Michigan, 1911; Minnesota, 1917; Missouri, 1917; Nevada, 1923; New Hampshire, 1917; New Jersey, 1913; New York, 1911; North Carolina, 1919; Ohio, 1912; Pennsylvania, 1912; Rhode Island, 1914; South Carolina, 1930; Vermont, 1915; Washington, 1915; Wisconsin, 1917.[4]

The Uniform Business Corporation Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1928, has been adopted in the following jurisdictions effective from the year indicated: Idaho, 1929; Louisiana, 1929; Washington, 1934.[5]

The Uniform Conditional Sales Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1918, has been adopted in the following jurisdictions effective from the year indicated: Alaska, 1919; Arizona, 1920; Delaware, 1919; Indiana, 1935; New Jersey, 1919; New York, 1922; Pennsylvania, 1925; South Dakota, 1919; West Virginia, 1925; Wisconsin, 1919.[6]

[2] Uniform Laws Annotated, vol. 5, iii.

[3] Uniform Laws Annotated, vol. 9, 1938 Cumulative Annual Pocket Part, p. 27.

[4] Uniform Laws Annotated, vol. 4, 1938 Cumulative Annual Pocket Part, p. 5.

[5] Uniform Laws Annotated, vol. 9, 1938 Cumulative Pocket Part, p. 29.

The Uniform Limited Partnership Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1916, has been adopted in the following jurisdictions effective from the year indicated: Alaska, 1917; California, 1929; Colorado, 1931; Idaho, 1920; Illinois, 1917; Iowa, 1924; Maryland, 1918; Massachusetts, 1924; Michigan, 1931; Minnesota, 1919; Nevada, 1931; New Jersey, 1919; New York, 1922; Pennsylvania, 1917; Rhode Island, 1930; South Dakota, 1925; Tennessee, 1920; Utah, 1921; Virginia, 1918; Wisconsin, 1919.[7]

The Uniform Negotiable Instruments Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1896, has been adopted in the following jurisdictions effective from the year indicated: Alabama, 1908; Alaska, 1913; Arizona, 1901; Arkansas, 1913; California, 1917; Colorado, 1897; Connecticut, 1897; Delaware, 1912; District of Columbia, 1899; Florida, 1897; Georgia, 1924; Hawaii, 1907; Idaho, 1903; Illinois, 1907; Indiana, 1913; Iowa, 1902; Kansas, 1905; Kentucky, 1904; Louisiana, 1904; Maine, 1917; Maryland, 1898; Massachusetts, 1899; Michigan, 1905; Minnesota, 1913; Mississippi, 1916; Missouri, 1905; Montana, 1903; Nebraska, 1905; Nevada, 1907; New Hampshire, 1910; New Jersey, 1902; New Mexico, 1907; New York, 1897; North Carolina, 1899; North Dakota, 1899; Ohio, 1903; Oklahoma, 1909; Oregon, 1899; Pennsylvania, 1901; Philippine Islands, 1911; Puerto Rico, 1930; Rhode Island, 1899; South Carolina, 1914; South Dakota, 1913; Tennessee, 1899; Texas, 1919; Utah, 1899; Vermont, 1913; Virginia, 1898; Washington, 1899; West Virginia, 1908; Wisconsin, 1899; Wyoming, 1905.[8]

The Uniform Partnership Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1914, has been adopted in the following jurisdictions effective from the year indicated: Alaska, 1917; California, 1929; Colorado, 1931; Idaho, 1920; Illinois, 1917; Maryland, 1916; Massachusetts, 1923; Michigan, 1917; Minnesota, 1921; Nevada, 1931; New Jersey, 1919; New York, 1919; Pennsylvania, 1915; South

[6] Uniform Laws Annotated, vol. 2, 1938, Cumulative Annual Pocket Part, p. 5.

[7] Uniform Laws Annotated, vol. 8, 1938 Cumulative Annual Pocket Part, p. 5.

[8] Uniform Laws Annotated, vol. 5, pp. vii, viii.

Dakota, 1923; Tennessee, 1917; Utah, 1921; Virginia, 1918; Wisconsin, 1915; Wyoming, 1917.[9]

The Uniform Sales Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1906, has been adopted in the following jurisdictions effective from the year indicated: Alabama, 1931; Alaska, 1914; Arizona, 1907; California, 1931; Connecticut, 1907; Delaware, 1933; District of Columbia, 1937; Hawaii, 1929; Idaho, 1920; Illinois, 1915; Indiana, 1929; Iowa, 1919; Kentucky, 1928; Maine, 1923; Maryland, 1910; Massachusetts, 1909; Michigan, 1913; Minnesota, 1917; Nebraska, 1921; Nevada, 1915; New Hampshire, 1923; New Jersey, 1907; New York, 1911; North Dakota, 1917; Ohio, 1909; Oregon, 1919; Pennsylvania, 1916; Rhode Island, 1908; South Dakota, 1921; Tennessee, 1919; Utah, 1917; Vermont, 1921; Washington, 1926; Wisconsin, 1912; Wyoming, 1917.[10]

The Uniform Stock Transfer Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1909, has been adopted in the following jurisdictions effective from the year indicated: Alabama, 1931; Alaska, 1914; Arkansas, 1923; California, 1931; Colorado, 1927; Connecticut, 1917; Idaho, 1928; Illinois, 1917; Indiana, 1923; Louisiana, 1911; Maryland, 1910; Massachusetts, 1910; Michigan, 1913; Minnesota, 1933; New Hampshire, 1937; New Jersey, 1916; New York, 1913; Ohio, 1911; Oregon, 1935; Pennsylvania, 1912; Rhode Island, 1912; South Dakota, 1921; Tennessee, 1925; Utah, 1927; Virginia, 1924; West Virginia, 1931; Wisconsin, 1913.[11]

The Uniform Warehouse Receipts Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1906, has been adopted in the following jurisdictions effective from the year indicated: Alabama, 1915; Alaska, 1914; Arizona, 1921; Arkansas, 1915; California, 1909; Colorado, 1911; Connecticut, 1907; Delaware, 1917; District of Columbia, 1910; Florida, 1917; Idaho, 1915; Illinois, 1907; Indiana, 1921; Iowa, 1907; Kansas, 1909; Kentucky, 1938; Louisiana, 1909; Maine, 1917; Maryland, 1910; Massachusetts, 1907; Michigan, 1909; Minnesota, 1914; Mississippi, 1920; Missouri, 1911; Montana, 1917; Nebraska, 1909; Nevada, 1913; New Jersey, 1907; New

[9] Uniform Laws Annotated, vol. 7, 1938 Cumulative Annual Pocket Part, p. 5.

[10] Uniform Laws Annotated, vol. 1, 1938 Cumulative Pocket Part, p. 5.

[11] Uniform Laws Annotated, vol. 6, 1938 Cumulative Annual Pocket Part, p. 5.

Mexico, 1909; New York, 1907; North Carolina, 1917; North Dakota, 1917; Ohio, 1909; Oklahoma 1915; Oregon, 1914; Pennsylvania, 1910; Philippine Islands, 1912; Puerto Rico, 1918; Rhode Island, 1908; South Dakota, 1913; Tennessee, 1909; Texas, 1919; Utah, 1911; Vermont, 1913; Virginia, 1908; Washington, 1913; West Virginia, 1917; Wisconsin, 1909; Wyoming, 1917.[12]

[12] Uniform Laws Annotated, vol. 3, 1938 Cumulative Annual Pocket Part, p. 5.

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